Petition

81-1301

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ALEXANDER L. STEVAS,
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No. 81-

IN THE

Supreme Court of the United States

October Term, 1981

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSEPH and MARY DiSALVATORE, Administrator and Administratrix of the Estate of MICHAEL DiSALVATORE, Deceased,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Can *direct* liability be imposed on the United States under the Federal Tort Claims Act on the theory that a government employee, who had not taken over the day-to-day operational control of the manner in which the work was to be performed by various independent contractors at a construction site, was negligent in failing to exercise the government's contractual powers to inspect the site and stop the work in order to obtain compliance with detailed safety provisions in a government contract, where this Court has rejected *vicarious* liability based on the same contractual powers?

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OPINIONS BELOW

The Court of Appeals issued a judgment order, but no opinion, in this case. The Order is reprinted in the Appendix at p. A1.[1] The district court issued four opinions in this case. The first was a denial of the government's motion for summary judgment, reported at 456 F. Supp. 1079 (E. D. Pa. 1978) (A3). The second was the district court's findings of fact and conclusions of law in favor of the government after the first trial, reported at 472 F. Supp. 816 (E. D. Pa. 1979) (A11). The third was the district court's supplemental findings and conclusions against the government after the court had set aside its decision and taken some further testimony, reported at 499 F. Supp. 338 (E. D. Pa. 1980) (A25). The fourth was its decision on damages, which was unreported (A44).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on September 22, 1981. A timely petition for rehearing was denied on October 16, 1981, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1) and 28 U. S. C. § 2101(c).

1. All future page references preceded by the letter "A" are to the Appendix to this Petition.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§ 1346. *United States as a defendant*

. . . . (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2671. *Definitions*

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

"Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

STATEMENT OF THE CASE

This case concerns the federal government's alleged liability under the Federal Tort Claims Act for an accident, resulting in death, which occurred on the construction site for the Social Security Administration Center in Philadelphia, Pennsylvania. Shortly after noon on April 12, 1974, Michael DiSalvatore, a 19-year-old unskilled employee of American Bridge Company, fell from the sixth floor of the structure under construction to the pit of an open elevator shaft.

At the time of the accident, DiSalvatore was helping to remove planking that American Bridge had placed over the opening of Elevator Shaft No. 1 as a safety measure. The planking had to be removed in order to install forms around the perimeter of the shaft which would allow the concrete floor to be poured. DiSalvatore and his partner, an experienced journeyman worker, had just finished removing the planking over the shaft on the fifth floor and were working on the sixth floor when the accident occurred.

The planks were removed one at a time, with each worker lifting and carrying one end of each plank. After several planks had been removed, DiSalvatore's partner left the vicinity of the shaft. Upon leaving, he instructed DiSalvatore not to remove any of the remaining planks by himself, but to await his return before continuing with the job. DiSalvatore did not follow these instructions. He continued to remove the planks and was engaged in this activity when he apparently lost his balance and fell.

In an action brought under the Federal Tort Claims Act, 28 U. S. C. § 1346(b), the district court held the United States legally responsible for DiSalvatore's death because of the failure of the government's resident engineer to compel its contractors to install a safety net in the open shaft (A26-27, A41). The court made no finding that

the government had in any sense taken control over the manner in which the work was to be done, including control over the installation of safety devices, from the contractors responsible for doing it or that Michael DiSalvatore believed or had any reason to believe that the government was taking any responsibility for his safety on the job. Rather, the court held that the absence of a safety net resulted from the government's failure to exercise certain of its contractual rights, specifically the right to inspect the job site; report safety violations to the violating contractors; stop the work or withhold payment to contractors, or threaten to do so, as a result of known safety violations; and inform others on the job site of the safety rules and regulations governing the job (A13, A20-21).

The contractual relationships upon which the court relied can be summarized briefly. As is common for major construction projects, several entities were involved. The General Services Administration ("GSA") owned the site. It hired two independent contractors, Turner Construction Company ("Turner") and a joint venture comprised of Owens-Corning Fiberglas Corp. and Wolf & Munier (the "Joint Venture"), as manager and prime contractor respectively. The Joint Venture hired Tishman Construction Co. ("Tishman") as construction manager; and Tishman hired several subcontractors, including DiSalvatore's employer, American Bridge. American Bridge was hired to design, fabricate, and erect structural steel on the site.

GSA had contracts with only two of the entities involved: Turner and the Joint Venture. Turner was paid a fixed fee to coordinate and direct the work of all other contractors and subcontractors. It maintained a full-time supervisory and inspection staff that "walked" the site at regular intervals to inspect both job performance and safety. Included among Turner's duties were the responsibility to review safety programs of the separate

contractors, to make safety recommendations, and to require adherence to the safety programs that the contractors and subcontractors adopted.

The GSA's contract with the Joint Venture obligated the latter to superintend construction of the building. It specifically provided that Turner's "inspection and general supervision is not intended to control [the Joint Venture] as to the manner of performance of the work." With respect to safety, the Joint Venture promised to "take proper safety and health precautions to protect the work, the workers, the public and the property of others." It further undertook to observe all applicable OSHA regulations as well as those set out in the GSA Handbook.

Both the Turner and Joint Venture contracts reserved certain powers to GSA. The Turner contract gave GSA the right to approve or disapprove safety programs managed by Turner and to require erection of certain safety devices where appropriate. The Joint Venture contract gave GSA the power to compel the Joint Venture to do the work in accordance with procedures established by Turner and orders issued by GSA. In addition, both contracts reserved the following power to GSA: to resolve factual disputes over the work; to require adherence to the GSA Safety Handbook or OSHA regulations; to inspect and test the work; and to stop the work for failure to comply with contract requirements. (A15-19).

Tishman had no contract with GSA. Neither did Tishman's subcontractor, American Bridge. The Tishman contract with American Bridge required the latter to cooperate in promoting safe working conditions, and to assume responsibility for compliance with OSHA regulations, including those concerning "covers over openings," whenever they applied to American Bridge work. There was never any dispute over American Bridge's responsibility, at the time of the accident, to provide adequate

safety protection over or around the elevator shaft down which Michael DiSalvatore fell.[2]

The GSA employee charged with negligence in failing to exercise the government's contractual rights was Albert Kandra, the resident engineer and the government's representative at the building site. Kandra's principal occupation was handling the paperwork associated with payment of the contractors and subcontractors. He periodically inspected the site, primarily to ensure that the work being paid for was actually complete. He also periodically resolved disputes among the contractors regarding responsibility for a particular piece of work. In addition, Kandra had a responsibility under the contract to notify contractors or subcontractors who were violating safety regulations, and to demand compliance. Kandra depended primarily on the Turner inspectors for reports of safety violations, and he attended monthly safety meetings that Turner convened. Kandra had contractual authority to stop the work if a safety violation went uncorrected, but he testified that in practice he would have to consult with his superiors in Washington before ordering a work stoppage.

Having found liability from these facts, the district court went on to assess damages. After projecting decedent's lost wages over his work life expectancy, the court subtracted his projected expenses for personal maintenance (food, shelter, clothing and medical care) in the amount of roughly $14 per day. The court did not reduce the figure to present worth, and the damage award, including funeral expenses, totalled $931,528.90 (A46-47).

The court of appeals affirmed without opinion, and denied the government's petition for rehearing, (A1, A53), in both cases over arguments that the Federal Tort Claims Act precluded government liability in this situation.

2. In fact, the plaintiffs are seeking recovery against the contractors in a separate suit pending in the Pennsylvania state courts.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With the Decisions of This Court and Raises an Important Question of Federal Law.

The Federal Tort Claims Act ("FTCA") specifically exempts the United States from liability for the negligence of its contractors.[3] The decision below ignores that limitation and reaches a result that is foreclosed by the decisions of this Court.

In *Logue v. United States*, 412 U. S. 521 (1973), the Court held that vicarious liability could not be imposed on the federal government for the negligence of one of its contractors, even though the government had retained substantial control over the contractor's performance. The contractor was a county detention facility in which the plaintiff's decedent had committed suicide while under custody. As in the present case, the argument in favor of government liability was grounded on the combination of the federal government's contract terms setting forth detailed health and safety rules, regulations and standards of conduct to be followed by the contractor; the government's contractual right of inspection; and its ultimate contractual power to compel the contractor's compliance with those standards. 412 U. S. at 529-30; *see also, United States v. Orleans*, 425 U. S. 807, 815 (1976). The Court held that this control was not enough to hold the government liable for its contractor's negligence.[4]

3. The Act limits the liability of the United States to acts or omissions by employees of a "federal agency," 28 U. S. C. § 1346 (b), a term which by statutory definition "does not include any contractor with the United States." 28 U. S. C. § 2671.

4. The Court intimated that the government might be liable for its contractor's conduct in more extreme cases where it retains the authority to supervise physically the detailed, day-to-day per-

The decision below apparently tried to avoid the *Logue* result by identifying a federal employee—GSA's resident engineer on the site—and holding the United States responsible for his failure to enforce the same type of contractual rights which this Court had rejected as a basis for vicarious liability in *Logue*. Since the precise issue in *Logue* was whether the contractor's negligent employees could be considered federal employees for FTCA purposes because of the government's indirect power to control their activities, pinning the liability on an admitted federal employee in this case provided a superficial basis for distinguishing *Logue*.[5] But that distinction is without substance. It misinterprets the basic rationale of the *Logue* decision and of the limitations on government liability which Congress incorporated into the Act.

The manifest purpose of the contractor exemption was to relieve the government of vicarious liability for the tortious acts or omissions of its contractors. "Billions of dollars of federal money are spent each year on projects performed by people and institutions which contract with the Government. These contractors . . . . are responsible

4. (Cont'd)

formance of the contractor's employees. *Logue v. United States*, *supra*, 412 U. S. at 527-30; *see also*, *United States v. Orleans*, *supra*, 425 U. S. at 815-16. The record permits no such findings in this case, and the district court made none.

5. Indeed, *Logue* was remanded to determine whether the government could be directly liable on the theory that its own employee had been actively negligent in releasing the plaintiff's decedent to the contractor with knowledge of his suicidal tendencies and without ordering constant surveillance. Direct negligence is not involved in the case at bar, however. Unlike *Logue*, the government employee did not create the hazardous situation which resulted in the death of the plaintiff's decedent. *See also*, fn. 7, below.

to the United States for compliance with the specifications of a contract or grant, but they are largely free to select the means of its implementation." *United States v. Orleans, supra,* 425 U. S. at 815-16. It would be prohibitively expensive, and virtually impossible, for the federal government to exert detailed physical control over these contracting operations. Congress therefore decided to negate expressly any legal duty on the part of the government to prevent or remedy the negligence of its contractors. To implement that purpose, this Court has consistently upheld that exemption where the Government has not actually intervened or been primarily responsible for physical control over its contractor's day-to-day performance. *See Logue v. United States, supra; United States v. Orleans, supra; Laird v. Nelms,* 406 U. S. 797 (1972).

This intent would be largely frustrated if the courts were free to circumvent the contractor exception as easily as the Third Circuit did here. This Court has already held that Congress did not intend to hold the government liable for the negligence of its contractors based on its contractual power to inspect the premises and to insist on strict compliance with detailed provisions governing job safety and other working conditions. *Logue v. United States, supra.* That holding should have controlled this case. Otherwise, to hold that these contract rights will not support vicarious liability under the Act, but that the failure of the government supervisor to exercise those rights will support direct liability "would be to judicially admit at the back door that which has been legislatively turned away at the front door," *Laird v. Nelms, supra,* 406 U. S. at 802, and render the contractor exception "virtually meaningless" [6]—

6. Because there will in almost every case be a government employee clothed with the authority to oversee performance and exercise its contract rights, there is virtually no case in which the independent contractor exception could not be circumvented by resorting to the theory of liability adopted by the court below.

a result which this Court has refused to countenance. *Logue v. United States, supra,* 412 U. S. at 532.[7]

II. The Decision Below Conflicts With the Law in Numerous Other Circuits.

The Third Circuit's decision in this case conflicts with the law in several other circuits. The Ninth Circuit, for example, has consistently rejected the Third Circuit's theory of liability, with the result that the two circuits have

7. Respondents will no doubt argue that this case involves more than a mere failure to detect safety violations, since the district court found that the GSA's resident engineer had received notice before the accident of "the absence of required protection" in the elevator shaft and had failed to resolve a dispute over who was responsible for rectifying the situation (A19-20). To the extent that the decision below turned on the question of notice, it raises a clear conflict between the circuits, which this Court should resolve. See pp. 12-13, below. But in fact the findings of notice were extraneous. The only notice received by the government was of a condition requiring planking or railings to prevent a fall. Yet the government was not held liable for any condition that precipitated DiSalvatore's fall. It could not have been since, had GSA's resident engineer inspected the opening in question on the morning of the accident, he would have found it adequately protected by the planking which the decedent was removing when he fell. Nor was the government held liable for failing to install planking on the floors below to break DiSalvatore's fall. Such planking would no doubt have caused some injury to the decedent, in which case Pennsylvania law would have denied liability under the indivisible injury rule in fall cases. *Barber v. John C. Kohler Co.*, 428 Pa. 219, 237 A. 2d 224 (1968). So the only theory of liability upon which even a contractor might conceivably have been held liable—and the one the court chose when it decided to reverse itself—was for failure to provide a safety net under the floor opening to break falls. But the government had received no notice of any condition requiring the use of safety nets to break falls. Therefore, the court was forced to rely on the government's mere power to inspect and failure to detect such a condition.

reached opposite conclusions in parallel fact situations. *Kirk v. United States*, 270 F. 2d 110 (9th Cir. 1959) illustrates this conflict. Kirk was an employee of a contractor hired by the Army Corps of Engineers to construct the Lucky Peak Dam in Idaho. He was helping to move forms used in the concrete pouring operation. Several days earlier some of the bolts holding the forms together had been removed on orders of the contractor's foreman. As a result, the forms collapsed and threw Kirk into the river, where he drowned. As in the present case, the plaintiff argued that the United States was liable for Kirk's death because, among other things, it failed to insist that safety nets be installed under the work area and failed to provide adequate safety lines to prevent Kirk's fall.[8] The alleged duty to do so was based on the following facts, virtually identical to those relied on in this case: a contractual requirement that the contractor follow detailed safety specifications; a right to inspect the work; the presence of government inspectors on the project who had the duty to, and did, inspect for compliance with safety requirements; and a right to stop the work if compliance were not obtained. Yet, unlike the Third Circuit, the Ninth Circuit held that the government's contractual rights created no legal duty "to Kirk to inspect and test the scaffold and movable forms and to carry out a continuous and comprehensive accident prevention program for the protection . . . of the employees of the independent contractors. . . ." *Id.*, 117.

The Ninth Circuit again reached the same result in *Roberson v. United States*, 382 F. 2d 714 (9th Cir. 1967), another fall case. Roberson sought recovery against the government for injuries caused by its failure to require an

8. Other failures alleged were the failure to discover that the forms had been unbolted and failure to provide adequate water rescue equipment and procedures.

independent contractor to provide a safety net which, along with handrails, toeboards and a guard rail, had been required by the contract. The contract reserved to the government the right to inspect the work for compliance with detailed safety regulations and to stop the work, if necessary, until violations were corrected. The government had appointed three safety officers, who had inspected the scaffold in question and had not insisted that the safety features required by the contract be installed. Despite this clear notice to the government of the deficiency, the court refused to impose liability on the government on the grounds that the rule of law announced in *Kirk* "makes it clear that no liability . . . can attach where the only Governmental undertaking relied upon is a safety inspection program in connection with work being performed by an independent contractor." *Id.*, 721-22. *See also, Jeffries v. United States*, 477 F. 2d 52, 55-57 (10th Cir. 1973) (detailed safety requirements, plus reservation of right to inspect and actual inspection, held insufficient to impose government liability for failure to detect loose rock which injured a miner during tunnel blasting).

The law in the Tenth Circuit conflicts similarly with the decision in the present case. In *United States v. Page*, 350 F. 2d 28 (10th Cir. 1965), *cert. denied*, 382 U. S. 979 (1966), the court refused to hold the government liable for the death of an employee due to an explosion at the plant of an independent contractor making rocket fuel for the government. As in the case at bar, the contract called for detailed safety procedures, a right to inspect the work and facilities, and the presence of government inspectors at the site charged with monitoring the contractor's safety performance. The court held that this type of control was insufficient to create government liability under the Federal Tort Claims Act, rejecting the basis for liability imposed by the Third Circuit here:

> "The fact that the contract may have reserved to the United States the right to inspect the work and facilities of the independent contractor, and the right to stop the work, does not in itself override or alter the general rule of non-liability for the torts of the contractor because no duty is created to employees or third parties. This includes the reservation to inspect for the adherence to contract safety provisions." *Id.*, 30-31.

As with the Ninth Circuit, the rule in the Tenth Circuit applies whether or not the government has actual notice of the dangerous condition. In *United States Fidelity & Guaranty Co. v. United States*, 446 F. 2d 851 (10th Cir. 1971), the court refused to impose liability on the government, which had contractual authority to stop the work in order to remedy a dangerous condition. Government liability was rejected even though a government inspector had observed the dangerous condition that later caused plaintiff to fall through a ventilator hole in the roof and done nothing about it. Under the court's reasoning, "since there was no duty owed from the government to the injured person, [the government inspector's conduct] is of no particular significance. . . ." *Id.*, 853.

The Third Circuit's decision also conflicts with the Fifth Circuit on this question. In *Alexander v. United States*, 605 F. 2d 828 (5th Cir. 1979), the court held that the federal government could not be liable for a contractor's employee's death in an explosion despite (1) its contractual power to inspect the contractor's munitions plant and to cease performance of the contract to correct violations of its detailed safety provisions and (2) the presence of government safety inspectors on the job. *See also, Market Insurance Co. v. United States*, 415 F. 2d 459 (5th Cir. 1969) (government's contractual powers to inspect the site and stop the work for violation of detailed safety

provisions in the contract, and presence of government safety inspectors on the job, held insufficient to charge the government with liability for death of independent contractor's employee).

Although the conflict is most obvious in the Fifth, Ninth and Tenth Circuits, several other circuit courts have rendered decisions which suggest that they too would not follow the principle of liability adopted by the court below. In the Sixth Circuit, the same conflicting principle appears to have been adopted, but in cases where alternative grounds also supported the result. *Grogan v. United States,* 341 F. 2d 39 (6th Cir. 1965); *Gowdy v. United States,* 412 F. 2d 525 (6th Cir.), *cert. denied,* 396 U. S. 960 (1969). The First Circuit has adopted the conflicting principle of the Fifth, Ninth and Tenth Circuits, but in a factual context that is not entirely similar to the present case. *See Perez v. United States,* 594 F. 2d 280 (1st Cir. 1979). The remaining circuits have applied the same rule as the Fifth, Ninth and Tenth Circuits, but as an interpretation of state law, rather than the Federal Tort Claims Act. *See Lipka v. United States,* 369 F. 2d 288 (2d Cir. 1966), *cert. denied,* 387 U. S. 935 (1967) (N. Y. law); *Cannon v. United States,* 328 F. 2d 763 (7th Cir.), *cert. denied,* 379 U. S. 832 (1964) (Ill. law); *Buchanan v. United States,* 305 F. 2d 738 (8th Cir. 1962) (Minn. law); *Lemby v. United States,* 317 F. Supp. 350 (N. D. W. Va. 1970), *aff'd per curiam,* 455 F. 2d 522 (4th Cir. 1971) (W. Va. law).

The clear conflict with the law in three circuits, and the evident possibility of a conflict with six others, warrant the grant of certiorari to review the judgment below.

III. The Decision Below, if Allowed to Stand, Could Seriously Affect the Government's Procurement Activity.

The approach of the lower courts in this case would, if accepted, fundamentally alter the federal government's

legal responsibilities under the Federal Tort Claims Act. The adverse consequences would be severe. The contractual rights at issue here are found in standard form documents that are used pervasively by GSA. Similar provisions appear in the standard contracts used by other government procurement agencies.[9]

The government has, prior to the decision below, had the right under those contracts to intervene in order to ensure that the work was done properly and safely. But it has never owed a legal duty to its contractors' employees to do so. By the simple device of predicating liability not on the rights themselves but on the federal employee charged with invoking those rights, the Third Circuit has now in effect taken those rights and turned them into a positive duty to intervene. In order to discharge that legal duty, the government would have to hire numerous inspectors to police construction sites and the plants of its suppliers, insist on full compliance with the panoply of safety regulations incorporated into those contracts, and, wherever compliance fell short, stop the work until the situation was remedied. This effort would duplicate the activities of the contractors who have been hired to, and

9. The Department of Defense, which accounts for more federal procurement than any other agency, requires all of its construction contracts to include clauses providing for detailed safety controls, 32 C. F. R. § 7-602.42 (DAR/ASPR); a right to inspect the work, 32 C. F. R. § 7-602.43; the right to stop work, 32 C. F. R. § 7-602.46; and the power for the contracting officer to decide disputes, 32 C. F. R. § 7-602.6. Similar provisions are required in all other federal construction contracts. See 29 C. F. R. § 1926.20 (safety requirements); 41 C. F. R. §§ 1-7.602-11, 32; 41 C. F. R. § 1-16.901-23A (inspection and suspension of work). The cases discussed above demonstrate similar provisions in the contracts of the Army Corps of Engineers (*Kirk*), Department of Interior (*Roberson, U. S. Fidelity & Guaranty*) and Department of Housing and Urban Development (*Perez*).

do, perform the same job. The substantial cost to the government is obvious. It is therefore important for the Court to grant certiorari and resolve whether the government has this far-reaching legal obligation.

CONCLUSION

Accordingly, the petitioner, United States of America, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding September 22, 1981.

Respectfully submitted,

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Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1245

JOSEPH and MARY DiSALVATORE, Administrator and Administratrix of the Estate of MICHAEL DiSALVATORE, Deceased

v.

UNITED STATES OF AMERICA,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D. C. Civil No. 76-1794)

Argued
September 21, 1981
Before: ALDISERT, HIGGINBOTHAM, and SLOVITER, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, and for the reasons set forth in the district court opinions by the Honorable Joseph S. Lord, III, Chief Judge, in *DiSalvatore v. United States,* No. 76-1794 (E.D. Pa. Dec. 29, 1980), *reprinted in* App. at 647A and *DiSalvatore v. United States,* 499 F. Supp. 338 (E.D. Pa. 1980); it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed in accordance with 28 U.S.C. § 1912.

By THE COURT,

_____

Circuit Judge

Attest:
SALLY MRVOS
Sally Mrvos, Clerk
DATED: Sep 22 1981

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 76-1794

JOSEPH DI SALVATORE and MARY DI SALVATORE, Administrator and Administratrix of the Estate of MICHAEL DI SALVATORE, Dec'd.

v.

UNITED STATES OF AMERICA

MEMORANDUM

JOSEPH S. LORD, III, *Ch. J.* September 15, 1978

This action brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, alleges that plaintiffs' decedent was killed as a result of defendant's negligence. The defendant has moved for summary judgment on the ground that any negligence which caused the decedent to be injured was conduct not of it or of its employees but rather of the independent contractors who were in possession of the construction site where the decedent was injured. Under the Federal Tort Claims Act, the defendant correctly points out, the United States cannot be vicariously liable for the negligence of persons other than its employees. Because we cannot conclude as a matter of law that the defendant is free of liability for its own employee's negligence, however, we will deny the motion.

The decedent, an employee of the American Bridge Company, was working on construction of the Social Security Administration Payment Center in Philadelphia when he fell from the sixth to the ground floor of the construction project. The defendant had entrusted the construction of this building to the General Services Administration, Public Buildings Service ("GSA"). GSA then entered into a contract with the Turner Construction Company ("Turner"), which provided that Turner would be GSA's overall construction manager for the project. GSA also entered into a construction contract with a joint venture consisting of Owens-Corning Fiberglass Corporation and Wolff & Minier Incorporated ("joint venture"), which was prime contractor for the construction project. The joint venture in turn engaged the Tishman Construction Company ("Tishman") as its construction manager. Tishman contracted with American Bridge Division of United States Steel Corporation ("American Bridge") for the design, fabrication and erection of structural steel at the site.

During the course of his employment with American Bridge, the sub-contractor, DiSalvatore was removing planking from an elevator shaft opening on the sixth floor when he lost his balance and fell down the shaft. Because there was no covering over the elevator shaft openings on any floor beneath the sixth, DiSalvatore's fall was unbroken and he was killed. The failure to cover the shaft on each of these floors violated the Occupational Safety and Health Administration's Safety and Health Regulations for construction, 29 C.F.R. § 1926.500, which were incorporated by reference into every contract relating to the construction.

We will assume for purposes of this motion that Albert Kandra, GSA's resident engineer, was the only gov-

ernment employee at the job site, and that the other entities involved in this construction were independent contractors with respect to the government. Kandra's job included the duties of coordinating the work of GSA's contractors and resolving factual disputes between the contractors and Turner, GSA's construction manager. Such a dispute developed when the subcontractor of Turner which was constructing the elevator continually removed the shaft protections in order to drop lines for rail installation after American Bridge, a subcontractor of Tishman and the decedent's employer, had replaced the protection. Turner and Tishman each claimed that the other had the responsibility to replace protections in floor openings. The result of this dispute was that neither one replaced the covering and the elevator shaft was left uncovered on the floors beneath the sixth. The plaintiffs allege that the defendant's employee, Kandra, negligently failed to coordinate the work and to resolve the dispute between the elevator contractor and American Bridge, and that as a result of this negligence the openings were uncovered at the time decedent fell. Thus, the plaintiffs argue, defendant is directly responsible for decedent's death.

In determining whether the defendant can be liable for the negligence of an employee under the Federal Tort Claims Act, we must determine whether any claim would lie against it under the law of the state where the allegedly tortious act or omission occurred, Pennsylvania, 28 U.S.C. § 1346(b), with the limitation that vicarious liability cannot attach for acts of persons who are not United States employees. As the defendant correctly points out, employers of independent contractors generally are insulated from liability under § 409 of the *Restatement (Second) of Torts* (1965), which provides that with certain exceptions "the employer of an inde-

pendent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." Insofar as this action is based on acts or omissions by the independent contractors, the defendant would not be liable to the plaintiffs under Pennsylvania law because of this doctrine.

But the basis of the plaintiffs' claim based on Kandra's negligence is not the conduct of the independent contractors and their employees. Rather, it is the alleged negligence on the part of the defendant's employee in an area of the work where control was maintained by an employee of the defendant rather than relinquished to an independent contractor and its employees—namely, the resolution of the dispute over who had the responsibility to replace the elevator shaft protections. An employer can be liable for the negligence of its employee in this situation under § 414 of the *Restatement (Second) of Torts* (1965), which the Pennsylvania Supreme Court explicitly adopted in *Byrd v. Merwin*, 456 Pa. 516, 317 A.2d 280 (1974). Section 414 provides:

> "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."

This section imposes liability on a defendant because of the defendant's own negligence or that of defendant's own employees and not because of the negligence of an independent contractor. Thus, § 414 can be the basis for liability under the Federal Tort Claims Act.

In *Byrd v. Merwin*, the property owner had retained the power to direct the order in which the work should be done. Contrary to the usual order of construction, a stair-

case was installed by a contractor after rather than before the electrical wiring was begun, and the plaintiff electrician was injured when a section of the uncompleted staircase fell. The Supreme Court upheld a verdict against the property owner by applying § 414. Its analysis relied principally on the second part of comment a to that section, which states:

> "The employer may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principle of Agency but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others."

The comment makes it clear that the control retained in *Byrd v. Merwin, i.e.*, to mandate the order in which the work should be done, is sufficient to invoke § 414 liability. This control, and the supervisory controls discussed in that comment generally, can be characterized as retained power to direct how the work should be done, in distinction to control over the results of the work. However, I see no qualitative difference between control over how the work should be done and the power to determine which subcontractor should do what in the event of a dispute between them during construction. In each instance, the employer of the independent contractor maintains jurisdiction to decide not merely what the product of the work will be and whether that work will go on, *see Toole v. United States*, 443 F. Supp. 1204, 1223-24 (E.D. Pa. 1977),

quoting Restatement (Second) of Torts § 414, Comment c (1965), but rather over the way in which the independent contractors will produce that result.

A limitation as to what retained control by an employer can provide the basis for § 414 liability is imposed by comment c to that section, which states:

> "*c.* In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such retention of a right of supervision that the contractor is not entirely free to do the work in his own way."

The purpose of the rule expressed in comment c is to insulate one employing an independent contractor from liability when the employer possesses only a general right of inspection and supervision to insure that the contractor is complying with the terms of the contract, that is, to oversee the *results* of the work. *See Fisher v. United States,* 441 F.2d 1288 (3d Cir. 1971). In contrast to the right to supervise the results of the work is the right of control over the *conduct* of the work at the construction site. This is the sort of control that exists in this case since once the dispute arose only the defendant's employee and not the contractors had the right to determine who should be responsible for the replacement of the protections.

Our determination that the defendant's power constitutes "retained control" under § 414 is dispositive of this motion. While this provision limits the liability of an employer to persons to whom they owe a duty to exercise reasonable care, we certainly cannot say as a matter of law that the defendant owed no such duty to the decedent. Furthermore, we cannot hold at this point that the defendant exercised reasonable care in its retained powers, particularly in light of the evidence that Kandra, the defendant's employee, had at least constructive notice of the dispute concerning the responsibility to cover the elevator shaft openings and of the danger posed by this dispute. Nor are we able to determine at this point whether the defendant's negligence in exercising this control, assuming there was such negligence, was the proximate cause of death. For these reasons, the defendant's motion for summary judgment will be denied.

JOSEPH S. LORD, III
Joseph S. Lord, III, Ch. J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 76-1794

JOSEPH DI SALVATORE and MARY DI SALVATORE,
Administrator and Administratrix of the Estate of
MICHAEL DI SALVATORE, Dec'd.

v.

UNITED STATES OF AMERICA

ORDER

AND NOW, this 15th day of September, 1978, it is hereby ORDERED that the defendant's motion for summary judgment be and it hereby is DENIED.

JOSEPH S. LORD, III
Joseph S. Lord, III, Ch. J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 76-1794

JOSEPH DISALVATORE and MARY DISALVATORE, Administrator and Administratrix of the Estate of MICHAEL DISALVATORE, Deceased

v.

UNITED STATES OF AMERICA

OPINION

JOSEPH S. LORD, III, *Ch. J.* June 26, 1979

This action brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, alleges that plaintiffs' decedent was killed as a result of defendant's negligence. Defendant's motion for summary judgment was denied on September 15, 1978, *DiSalvatore v. United States of America*, 456 F. Supp. 1079 (E.D. Pa. 1978), and the issue of liability was tried before me on December 18 and 19, 1978. I now make the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. Michael DiSalvatore was employed by American Bridge Company to work on construction of the Social Security Administration Program Center at 3rd and Spring

Garden Streets, Philadelphia, Pennsylvania. (P. 23, part II, § Ia and § IIb).[1]

2. Michael DiSalvatore was killed at 12:05 P.M. on April 12, 1974 when he fell from the sixth floor of the building to the floor of the pit of freight elevator No. 1. (P. 23, part II, § 4A).

3. Entities Involved—

A. The General Services Adminisration of the United States (GSA) is the owner of the construction site at 3rd and Spring Garden Streets, Philadelphia. The terms "contracting officer", "resident engineer" and "project manager", when used in the applicable contracts refer to United States Government employees. (P. 40, P. 41; N.T. 19 & 20). Albert Kandra, as Resident Engineer, was the Government's representative on the job site at the Social Security Building. (N.T. 9, N.T. 12, N.T. 21).

B. Turner Construction Company (Turner) was hired by GSA as overall construction manager for the Social Security Administration Center project in Philadelphia. (P. 40).

C. Owens-Corning Fiberglass Corporation and Wolf & Munier, Inc. (Owens-Corning), a joint venture, was hired by GSA as the prime contractor for the Social Security Administration Center project. (P. 41).

D. Tishman Construction Company (Tishman) was hired by the Owens-Corning-Wolf-Munier joint venture as construction manager. (P. 41).

E. American Bridge Company was hired by Tishman Construction Company to design, fabricate and erect the structural steel at the site. (D-1).

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1. (The parenthetical citations following each finding of fact refer to the plaintiffs' trial exhibits (P), defendant's trial exhibits (D) and the notes of testimony (NT).

The Accident

4. Michael DiSalvatore's specific job at the time of the accident was to uncover the floor opening for freight elevator No. 1 on the sixth floor of the Social Security Building. (P. 23, part II, § 11 D).

5. The planking was being removed to allow the concrete workers to frame out the elevator shaft. (N.T. 47-48; N.T. 77; N.T. 81; N.T. 90-91; N.T. 98-99). The planking had already been removed from the floors below the sixth. (N.T. 214).

6. Although not an imperative procedure, removal of the planking from an elevator shaft for the purpose of framing the opening is an acceptable method of construction. When this removal method is used safety requires either that the floor below be planked or that a net be hung in the open shaft. (N.T. 120-121).

7. At the time of DiSalvatore's accident, the elevator opening on the sixth floor was protected neither by planking on the floor below nor by a net hung in the shaft. (N.T. 214; N.T. 220; N.T. 270).

8. The failure to have either a net hung from the sixth floor elevator opening or planking on the fifth floor shaft violated the safety provisions of the governmental construction contracts. (N.T. 43; N.T. 88-89; N.T. 121; N.T. 127; P. 23, part II, § III D1).

9. At the time of his accident, DiSalvatore was working with Harry Rolf, a journeyman ironworker and DiSalvatore's "buddy" on the job. (N.T. 209). DiSalvatore and Rolf removed the planks over the elevator opening by standing at the end of each board and rolling it over the edge of the shaft onto the deck. Each plank would then be carried to the other end of the building by both men. (N.T. 209; N.T. 220; N.T. 223-4).

10. Removal of the planking from the sixth floor elevator shaft was a two man job. (N.T. 124-25; N.T. 240). Performance of the task alone, without a co-worker or "buddy", was unsafe. (N.T. 196).

11. During removal of the planking on the sixth floor, Mr. Rolf, DiSalvatore's "buddy", left the elevator shaft opening. Rolf told DiSalvatore that he would be right back and that DiSalvatore should wait until he returned to continue removing the planks. When Rolf left the elevator shaft, DiSalvatore was standing several feet away from the opening. (N.T. 209-210; N.T. 224).

12. DiSalvatore continued to remove the planking from the sixth floor elevator without his "buddy", Rolf. DiSalvatore attempted to cross the elevator shaft carrying alone one of the planks that he and Rolf together had been removing. This attempt was unsafe. DiSalvatore lost his balance and fell with the plank down the shaft. The fall was caused by DiSalvatore's unsafe attempt to perform the job alone. (N.T. 193-194; N.T. 227-236).

13. DiSalvatore fell 98′ down the open elevator pit to his death. (P. 23, part II, § II D).

14. The absence of required safety devices, *i.e.*, nets hung in the shaft or planking on the floor below, although the cause of DiSalvatore's death, did not cause DiSalvatore's fall. (N.T. 124-125).

15. DiSalvatore's employer, American Bridge, requires that removal of planking from an elevator shaft opening be performed by two workers. If one worker leaves for whatever reason, his co-worker must wait until the "buddy" comes back, according to official American Bridge policy. (N.T. 213). However, there is an unwritten rule of construction work that an employee found

standing idly, even if awaiting the return of his "buddy" to continue a two-worker job, is subject to immediate dismissal. Although this rule was never stated by American Bridge, the wide-spread practice in the construction industry of firing on the spot a worker caught standing idly undermined the American Bridge requirement that planking from an elevator opening be removed only by two workers). (N.T. 125; N.T. 196).

The Contracts

16. GSA and Turner Construction: The contract between GSA and Turner Construction provided that the services of the Construction Manager (Turner) be performed under the general direction of the Project Manager (GSA). GSA could, at its option, manage the project during the construction phase. (P. 40, § 1). During the construction phase, GSA had the right to:

A. Resolve any disputes in interpretation of meaning, plans and specifications (P. 40, § 5c);

B. Approve or disapprove Turner's selection of the job site staff (P. 40, § 5e);

C. Direct Turner to implement construction procedures desired by GSA (P. 40, § 5f);

D. Approve or disapprove Turner's selection of sub-contractors (P. 40, § 5i). GSA had final approval over the pay of sub-contractors (P. 40, § 5r);

E. Approve or disapprove Turner's recommendations for safety programs (P. 40, § 51);

F. Approve or disapprove Turner's use of any outside personnel (P. 40, § 7);

G. Approve or disapprove any change by Turner in its own key personnel (P. 40, § 8);

H. Require Turner to remove from the project any person deemed incompetent by GSA (P. 40, §§ 9, 31);

I. Order that Turner's work be suspended, delayed or interrupted for such periods of time as determined to be appropriate for the convenience of GSA (P. 40, § 15; N.T. 19);

J. Serve as the final arbitrator of on-site job disputes (P. 40, § 21);

K. Require that Turner provide safety barricades, posts and planking on the job site as appropriate (P. 40, §§ 28-29);

L. Approve all payroll changes for on-site personnel (P. 40, § 30c);

M. Remove from the job site all general condition items such as safety barricades, posts and planking found to be defective at no additional cost to GSA (P. 40, § 31); and

N. Require compliance by Turner with all requirements of the GSA Accident and Fire Prevention Handbook (GSA Handbook), which was part of the contract (P. 40, § 33). GSA was responsible for ascertaining that the requirements set forth in the Handbook were being adhered to by the contractors. If the contractors failed to comply with the Handbook requirements, GSA had the duty to notify the contractor of the violation and order that it be corrected immediately or that the work be stopped. (P. 56, § 3b).

17. GSA and Owens, Corning, Wolf and Munier: All work to be done by Owens, Corning, Wolf and Munier was under the direction of GSA (P. 41, § 2.1, general conditions). GSA had the right to:

A. Resolve all factual disputes involving Owens-Corning (P. 41, § 6, general provisions);

B. Fire any personnel on the job that GSA thought incompetent (P. 41, § 9, general provisions);

C. Inspect and test the work (P. 41, § 10, general provisions);

D. Make the contractors replace, change or correct any workmanship GSA considered unacceptable (P. 41, § 10, general provisions);

E. Approve or disapprove Owens-Corning's resident superintendent and foreman (P. 41, § 11, general provisions);

F. Suspend, delay or interrupt all or part of the work for such period as was appropriate for the convenience of GSA (P. 41, § 23, general provisions);

G. Compel Owens-Corning to do the work in accordance with any order issued by GSA (P. 41, § 2.2, general conditions);

H. Terminate the contract in whole or in part when in the interest of GSA to do so (P. 41, § 30.1, general conditions; N.T. 25);

I. Stop the work for failure of Owens-Corning to comply with any of the contract requirements (P. 41, § 31.1, general conditions; N.T. 26);

J. Compel compliance by Owens-Corning with the GSA Handbook for Accident and Fire Prevention, which was incorporated into the contract (P. 41, § 14, modification of general conditions). GSA had the responsibility for ascertaining whether Owens-Corning was adhering to the requirements set forth in the Handbook. If Owens-Corning failed to do so, GSA had the duty to notify Owens-Corning of the violation and order that the violation be corrected immediately or that work be stopped. (P. 56, § 3b).

K. Direct the Construction Manager (Turner) in its supervision of the Owens-Corning work (P. 41, § 4.2 special conditions);

L. Require compliance with all procedures set up by the Construction Manager (Turner) (P. 41, § 4.4, special conditions);

M. Compel access to the work for the purpose of inspection at any time (P. 41, § 5.1, special conditions);

N. Require defective work to be corrected to conform to the contract requirements (P. 41, § 7.2, special conditions);

O. Resolve any dispute between Turner and Owens-Corning on the job site (P. 41, § 18.4, special conditions);

P. Require that Owens-Corning provide protective equipment for workmen as provided in the Occupational Safety and Health Administration (OSHA) regulations (P. 41, § 18.1, special conditions; N.T. 251-252); and

Q. Set the working hours of Owens-Corning's personnel (P. 41, § 4, general conditions). GSA did not by virtue of this authority become responsible for the unspoken rule that a worker found standing idly could be dismissed immediately regardless of the reason for his inactivity.

Role of Albert Kandra, GSA Representative on the Site

18. As Resident Engineer and government representative on the job site, Mr. Kandra was the ranking GSA employee and therefore served as general safety officer for the project. (N.T. 158-9). He had the responsibility to perform the many duties listed above, including particularly:

A. Resolve disputes or differences of opinion as to which contractor was responsible for the performance of specific duties on the construction site (N.T. 15; N.T. 75);

B. Inspect the job site during construction (N.T. 15);

C. Report safety violations to the violating contractor (N.T. 16-17; N.T. 61-62; N.T. 87-90).

D. Ascertain whether the work was being performed in compliance with GSA Handbook Safety Requirements and, if not, order that the work be suspended, delayed or interrupted. (N.T. 19; N.T. 21; N.T. 27; N.T. 89; P. 40, § 15, 3a, 3b; P. 41, general conditions, sub-section 30-31);

E. Write to the violating contractor advising that the job would be stopped if a specific safety violation was not corrected (N.T. 69; N.T. 80);

F. Withhold monthly payments if a contractor was not performing in accordance with the contract requirements (N.T. 78); and

G. Inform the employees on the job site of the OSHA safety rules and regulations which governed this job project (N.T. 158).

19. Before DiSalvatore's accident, a dispute arose between Turner Construction and Tishman Construction over compliance with the OSHA regulations incorporated in Paragraph 18.1 of the contract between GSA and Owens-Corning. (N.T. 252). A Mr. Mitchell from Turner Construction urged Tishman Construction to take immediate steps to correct the failure to meet the OSHA requirements. Tishman failed to do so. (P. 23, part II, § III A and B; P. 23, part VI). GSA, through its representative, Mr. Kandra, was aware of but did not resolve

this dispute between Tishman and Turner. (P. 23, part VI letter dated 4/11/74).

20. GSA was notified on the following dates of the absence of required protection in the elevator shaft down which DiSalvatore fell: April 11, 1974 (P. 23, part VI, letter dated 4/11/74); April 10, 1974 (P. 23, part VI, letters dated 4/10/74); March 28, 1974 (P. 23, part VI, letter dated 3/28/74; P. 23, part VI, memo dated 3/28/74); March 22, 1974 (P. 23, part VI, memo); March 21, 1974 (P. 23, part VI, written construction safety survey); March 19, 1974 (P. 23, part VI, letter from Turner Construction); March 6, 1974 (P. 23, part VI, letter sent to Turner Construction); March 5, 1974 (P. 23, part VI, memo); and February 25, 1974 (P. 23, part VI, letter).

21. Mr. Kandra, although it was his responsibility to do so, did not:

A. Inspect the job site during construction because he was busy with paper work in his trailer (N.T. 77; N.T. 79; N.T. 87);

B. Report the open freight elevator shaft to the violating contractors (P. 2; P. 3; N.T. 87);

C. Stop the job or withhold payment to contractors as a result of their known safety violations (N.T. 27). He did not even know that under the contract he had this authority (N.T. 17; N.T. 27; N.T. 69);

D. Write letters to violating contractors threatening to stop the job (P. 23, part VI);

E. Inform others on the job site of the safety rules and regulations which govern the project. He did not even know the contents of these regulations, although they were available in his office and part of his records. Instead, he relied on the contractors and sub-contractors

to be familiar with these rules. (N.T. 81; N.T. 95; N.T. 97); or

F. Read the GSA contracts and know his responsibilities as set forth therein (N.T. 25).

II. Discussion

Defendant argues, *inter alia,* that it has incurred no liability under the Federal Tort Claims Act because: (a) the negligence with which plaintiff charges GSA was not the cause in fact of DiSalvatore's accident under controlling law; and (b) DiSalvatore was contributorily negligent and is thus barred from any recovery under applicable tort principles. Because I must agree with these two contentions, I will here discuss only cause and contributory negligence and will express no conclusion concerning the many other issues raised by the above facts.

A. Cause

Pennsylvania law governs the substantive issues of liability in this action. 28 U.S.C. § 1346(b). The leading Pennsylvania case on causation in an accidental fall is *Barber v. John C. Kohler Co.,* 428 Pa. 219 (1968). Plaintiff in *Barber,* while working on a scaffold three feet above the ground, fell into an open hole sixteen feet deep. He alleged that defendant was negligent in failing to cover the hole. The Pennsylvania Supreme Court, affirming the lower court's dismissal of plaintiff's suit for failure to establish cause, held that "while appellant may have sustained greater injuries by falling to the bottom of the hole than he would have received had the hole been covered, that has no bearing on *the cause of the fall* . . . . [I]t is clear that appellee was not *the cause of the fall* . . . . [T]he extent of the injuries is irrelevant to a determination of the *cause of the accident.*" 428 Pa. at 221-22. (emphasis supplied). *Cf. Colosimo v. May Department*

Store Co., 466 F.2d 1234 (3d Cir. 1972) (Hastie, J. concurring) (summarizing *Barber* holding).

Under the rule of causation stated in *Barber*, the relevant determination is the cause of *decedent's fall*, not *decedent's injury*. DiSalvatore's *fall* was caused by his attempt to perform alone the two man task of removing the sixth floor elevator shaft planking, not by defendant's allegedly negligent failure to prove either a safety net or planking on the fifth floor opening. Finding of Fact No. 12; Finding of Fact No. 14. One of the frustrations encountered in the mandatory application of state law is its stultifying effect on federal judges. The rationale of the Pennsylvania Supreme Court in *Barber* is, to my mind, sophomoric and logically indefensible. And yet, despite my own convictions, I am bound by its holding. It follows that under Pennsylvania law, I must conclude that plaintiffs have failed to prove the necessary causal connection between any negligence of defendant and the accident.

B. Contributory Negligence

A second reason that defendant is entitled to judgment is DiSalvatore's contributory negligence. Because this accident occurred in 1974, two years before the effective date of Pennsylvania's comparative negligence statute, the action is governed by traditional rules of contributory negligence. DiSalvatore's attempt to perform alone the two-person task of removing the planking from the sixth floor elevator shaft was unsafe and the cause of his fall. Finding of Fact No. 10; Finding of Fact No. 12. Accordingly, DiSalvatore was contributorily negligent and plaintiffs are totally barred from recovery.

Plaintiffs contend that the unspoken policy of immediately dismissing a construction worker found standing idle compelled decedent to perform the unsafe task of removing alone the sixth floor planking and therefore ab-

solves him of contributory negligence. Finding of Fact No. 15. Whatever estoppel effect that compulsion may have in a suit against American Bridge, an issue on which I express no opinion, defendant United States was not responsible for the unwritten dismissal policy and is not precluded from raising successfully the contributory negligence defense. Finding of Fact No. 17Q.

The tragic circumstances of DiSalvatore's death make this conclusion a most difficult one to reach. Nonetheless, "motives of commiseration, from whatever source they follow, must not mingle in the administration of justice. Judges, in the exercise of their functions, have frequent occasion to exclaim, 'durum valde durum, sed sic lex est.'" *Penhallow v. Doane's Adm'rs*, 3 U.S. (Dall.) 54, 88-89, 1 L.Ed. 507, 521-22 (1795).

Conclusions of Law

1. I have jurisdiction over this case by virtue of the Federal Tort Claims Act, 28 U.S.C. § 1346(b).

2. Pennsylvania law governs the substantive issues of liability in this action. 28 U.S.C. § 1346(b).

3. Under Pennsylvania law, defendant's alleged negligence was not the cause of Michael DiSalvatore's fall and the United States is therefore not liable for any of DiSalvatore's injuries.

4. Under the law of Pennsylvania, DiSalvatore was contributorily negligent for continuing work without his "buddy" and plaintiffs therefore cannot recover from this defendant.

5. The United States is entitled to judgment in its favor.

/s/ Joseph S. Lord, III
Joseph S. Lord, III, Ch.J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 76-1794

JOSEPH DiSALVATORE and MARY DiSALVATORE, Administrator and Administratrix of the Estate of MICHAEL DiSALVATORE, Deceased

v.

THE UNITED STATES OF AMERICA

ORDER

AND NOW, this 26th day of June, 1979, it is hereby ORDERED that judgment be entered in favor of defendant, The United States of America.

/s/ JOSEPH S. LORD, III
Joseph S. Lord, III, Ch.J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 76-1794

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v.

UNITED STATES OF AMERICA

OPINION

JOSEPH S. LORD, III, *Ch. J.* September 29, 1980

I. PRELIMINARY STATEMENT

This case is in a somewhat anomalous posture. It was tried before me without a jury. I made findings of fact to which I applied certain conclusions of law, resulting in a verdict for defendant. Plaintiff moved for a new trial. Following oral argument on the motion, I was persuaded that I had applied an incorrect standard of law. In effect, I had given an erroneous charge to the factfinder and I therefore granted the plaintiffs' motion. I have now reconsidered the testimony presented in both trials and have reached the conclusions which follow.

Preliminarily, I adopt and reaffirm the findings of fact and conclusions of law previously filed, except as hereinafter noted, and as may be augmented by any additional findings of fact or conclusions of law appearing in

this opinion. Finding of Fact No. 8 is amended to add as trial references N.T. 205, 270.

Finding of Fact No. 8A is added following Finding of Fact No. 8 as follows: Defendant's failure to provide or require a safety net in the open shaft was negligence.

Finding of Fact No. 10 is stricken.

Finding of Fact No. 12 is amended to read as follows: it is impossible to determine from the evidence (a) whether, at the time of the accident, there was one plank remaining (N.T. 210, 212, 224) or three (N.T. 193, 194, 195); (b) whether decedent was caused to fall because he attempted to remove a plank alone (N.T. 193, 195) or because of the warped and rough condition of the plank he was standing on (N.T. 193, 196, 200, 220); (c) whether it was unsafe or improper for one man to continue to remove planking alone (N.T. 125, 213).

Finding of Fact No. 14 is amended to read as follows: The absence of a required safety device, *i.e.*, a net hung in the shaft, was the cause of DiSalvatore's death, although not the precipitating cause of his fall.

Finding of Fact No. 15 is amended to read as follows: Ordinarily the removal of planking for an elevator shaft is a two-man job. However, there is an unwritten rule of construction work that an employee found standing idly, even if awaiting the return of his "buddy" to continue a two-man job, is subject to immediate dismissal (N.T. 125, 196). The following findings are added following Finding of Fact No. 15.

Finding of Fact 15A—In continuing to remove the planking alone, plaintiff acted under the economic duress of the possible loss of his job if he stood idle and in working alone decedent did not act voluntarily or unreasonably (N.T. 125).

Finding of Fact 15B—Decedent was not guilty of contributory negligence or voluntary assumption of risk.

Finding of Fact 15C—If a safety net had been in place in the elevator shaft immediately below the sixth floor, decedent would have suffered no injuries from the fall and his death resulted from the absence of the safety net.

Finding of Fact 17Q is amended by striking the second sentence therefrom.

II. Negligence and Causation

Although Pennsylvania law governs the substantive issues of liability in this action, 28 U.S.C. § 1346(b), I face a formidable task in determining exactly what Pennsylvania law is as applied specifically to the facts before me. "[T]he concept that a federal court must determine state law is somewhat misleading inasmuch as it implies the existence of a readily accessible and easily understood body of state law." *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 661 (3d Cir. 1980) (citation omitted). There is a body of state law pertinent to the facts of this case, but it is far from being "easily understood." Since Pennsylvania law is presently unclear, then, it is my job to predict what a Pennsylvania court would do if confronted with the facts before me. Of course, although this is not a diversity case, I adopt the same approach of making that prediction as if it were.

> Such an estimate cannot be the product of a mere recitation of previously decided cases. Rather, as in any diversity case, a federal court must be sensitive to the doctrinal trends of the state whose law it applies, and the policies which inform the prior adjudications by the state courts.

Becker v. Interstate Properties, 569 F. 2d 1203, 1205-06 (3d Cir. 1977), *cert. denied*, 436 U.S. 906 (1978).

It will therefore be necessary to analyze the Pennsylvania cases and to resolve any apparent conflicts by the application of doctrinal trends, internal philosophical changes in the highest Pennsylvania court itself, federal decisional law applying state law, the Restatement of the Law, policies underlying state decisions and the presence or absence of result-influencing factors.

Defendant relies exclusively on *Barber v. John C. Kohler Co.*, 428 Pa. 219, 237 A.2d 234 (1968) in arguing that plaintiffs have failed to prove the necessary causal connection between the negligence of defendant and the accident. In *Barber*, plaintiff was working on a scaffold three feet above the ground. A brace on the scaffold slipped, causing plaintiff to fall into an open hole sixteen feet deep. He alleged that defendant's negligent failure to cover the hole caused his injuries to be more severe than they would have been had the hole been covered. The lower court sustained a demurrer which was affirmed. The Supreme Court said:

> For appellant's injury resulted not from appellee's negligence, but from the slipping of the brace. . . . [W]hile appellant may have sustained greater injuries by falling to the bottom of the hole than he would have received had the hole been covered, that has no bearing on the cause of the fall. Whether the fall was caused by appellant's own negligence, as in the cases cited, or by a third party's negligence with regard to the scaffold cannot and need not be determined here. The same result obtains either way, for it is clear that appellee was not the cause of the fall.
>
> . . . Moreover, a long line of cases in this court has held that the determination of the extent, if any, of incremental injury resulting from defendant's negligence is impossible to determine. This court has

> continually stated that, in a case like the instant one, a lessening of injury, absent defendant's negligence, is pure conjecture.

Id. at 221-22, 237 A.2d at 225-26.

In *Barber*, the court primarily relied on two earlier Pennsylvania Supreme Court cases, *Frisch v. Texas Co.*, 363 Pa. 619, 70 A.2d 290 (1950) and *Zlates v. Nasim*, 340 Pa. 157, 16 A.2d 381 (1940).

In *Frisch*, plaintiff slipped on the sidewalk and then fell into defendant's nearby open grease pit. The trial court directed a verdict for defendants which was affirmed. The Supreme Court said:

> The court below very properly said: "The presence of the defendant's grease pit had no connection with that slipping or tripping. . . . Had the opening been covered at the time, the plaintiff would have landed on the cover instead of in the pit, and whether he would have been hurt more or less is pure conjecture."
>
> . . . .
>
> An analysis of these cases makes it clear that the grease pit was in no way the cause of plaintiff's injury and recovery cannot be predicated upon the mere conjecture that his injuries might have been less serious had the grease pit not been there.

363 Pa. at 622, 624, 70 A.2d at 292, 293.

Zlates is another fall case in which defendant's conduct had no bearing on plaintiff's initial fall. In that case, plaintiff left defendant's porch via a screen door. When she pushed the door open, it stuck and stopped against the side of the building. She reached out to close it, but lost her balance and fell into an open areaway and down the cellar steps. The Supreme Court of Pennsylvania affirmed the trial court's denial of recovery, saying:

> Damages cannot be awarded because the unguarded areaway was not the proximate cause of her fall. The proximate cause was her leaning so much toward the screen door as to lose her balance. Furthermore, this was absence of care on her part and, therefore, contributory negligence. . . . While she may have sustained greater injuries by falling down the cellar steps than she would have received had she dropped to the cement floor of the porch, that makes no difference in searching out the cause of her fall. With that the unguarded stair opening had nothing to do.

340 Pa. at 158, 159, 16 A.2d at 381.

Barber, Frisch and *Zlates* have a superficial similarity to this case. But they are not, I think, determinative. Upon analysis, these cases deny recovery on two grounds: (1) the truism that the condition on which plaintiff's claim is based, *e.g.*, the uncovered pit, was not the proximate cause of the fall; (2) that the assessment of incremental injury would be too speculative to support a jury finding.[1] *See also Elliott v. Allegheny County Light Co.*, 204 Pa. 568, 569, 54 A. 278 (1903).

By way of contrast there is another group of cases which permit recovery whose operative facts are qualitatively no different from the *Barber* line facts. Yet, these cases permit recovery. Over one hundred years ago, in *Grant v. Erie*, 69 Pa. 420, 8 A.R. 272 (1871), the City of Erie was authorized to make and establish a number of reservoirs to supply water in case of fires. The reservoirs were erected but fell into decay. Plaintiff's property was consumed by fire because of insufficient water. In permitting recovery, the court said:

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1. "[T]he jury may not be permitted to reach its verdict merely on the basis of speculation or conjecture." *Smith v. Bell Telephone Co. of Pa.*, 397 Pa. 134, 138, 153 A.2d 477, 479 (1959).

> The purpose of the reservoir being to extinguish fires, and the fire having been shown not to have been extinguished in consequence of the non-performance of the duty imposed, it would be no answer, perhaps, to say that the proximate cause of the injury was the fire, and the want of water only the remote cause. If it were made the duty of a municipality to station a police officer at a particular corner, to protect the foot passengers from being run over by passing vehicles, it may be doubted whether it would be an answer to an action, to say that the cause of the injury was the horse and wagon and not the absence of the officer.

Id. at 423, 8 A.R. at 274.

In *Doyle v. South Pittsburgh Water Co.*, 414 Pa. 199, 199 A.2d 875 (1964), the Supreme Court of Pennsylvania held that a defendant who failed to maintain a fire hydrant in proper condition was liable to a homeowner whose house burned to the ground because there was no water to fight the fire, even though the defendant had nothing to do with starting the fire. In his opinion, Judge Musmanno noted that:

> In arguing before this Court, the water company asserts that it was not the lack of water which destroyed Plaintiffs' home—it was the fire. This is like saying that a person who starves to death dies not because of lack of food but because of physical debility.

414 Pa. at 202, 199 A.2d at 876.

In *Bleman v. Gold*, 431 Pa. 348, 246 A.2d 376 (1968) the plaintiff's buidings were first weakened by an explosion at defendant's adjoining apartment and then levelled as a result of nearby excavation. Plaintiff argued that because of defendant's negligence in permitting the explosion to occur, the damages to its building caused by the excavation

were greater than they would have been otherwise. The Pennsylvania Supreme Court allowed recovery, holding that one who creates a dangerous condition is liable for the results even though his negligence is not entirely responsible for the damage. The court quoted with approval from *Stark v. Lehigh Foundries, Inc.*, 388 Pa. 1, 11, 130 A.2d 123, 130 (1957): "One who negligently creates a dangerous condition cannot escape liability for the natural and probable consequences thereof, although the innocent act of a third party may have contributed to the final result." 431 Pa. at 353, 246 A.2d at 380 (citation omitted).

In both the *Barber* line and the *Doyle-Bleman* line, the condition created or maintained by the defendant was not the sole factor in the damage-producing concatenation of events. In both lines of cases there was an intermingling of damage resulting from factors not connected to defendant and those resulting from factors for which defendant was responsible. In one group recovery was denied; in the other, it was allowed. In view of this apparent conflict,[2] my function is to predict which reasoning Pennsylvania would adopt today and which result it would reach. For the reasons which follow I have concluded that Pennsylvania would allow recovery.[3]

1. I endorse and reiterate what Judge Scalera said in *Hardy v. Volkswagen of America*, 65 F.R.D. 359 (W.D. Pa. 1975) and his quotation of Judge Aldisert's words:

> To begin with, we note that the courts of Pennsylvania, once known for being conservative in the area of torts, have become more liberal. "In recent years

2. *See Dyson v. General Motors Corp.*, 298 F. Supp. 1064, 1074 (E.D. Pa. 1969).

3. Provided of course decedent was not guilty of contributory negligence, discussed *infra*.

> we have witnessed rapid, if not revolutionary, development in judge-made tort law by Pennsylvania courts," said Circuit Judge Aldisert in *Quinones v. United States*, 492 F.2d 1269, 1278 (3d Cir. 1974). "It will be noted that in each of these developments the Pennsylvania court was expanding and not contracting liability of defendants and increasing recoveries for plaintiffs." 492 F.2d at 1279.

Id. at 362.

This expansion of liability in part reflects a developing and humane policy of treating compensation for personal injuries as a cost of doing business, or in other words, as a cost of making money. The Pennsylvania Supreme Court has responded to this humanitarian recognition. *Ayala v. Philadelphia Bd. of Educ.*, 453 Pa. 584, 305 A.2d 877 (1973), which abolished the doctrine of governmental immunity, illustrates the liberalized approach of Pennsylvania courts. It also illuminates the policy of just distribution of loss: "Imposition of tort liability will, thus, be more responsive to current concepts of justice. Claims will be treated as a cost of administration and losses will be spread among all those benefited by governmental action." 453 Pa. at 599, 305 A.2d at 844.

Equally enlightening on Pennsylvania's shift in attitude is *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970), adopting the rule of liability without impact.[4] One of the arguments advanced by defendant was the difficulty of establishing causal connection, an argument similar to the *Barber-Frisch* courts' holdings that apportionment of incremental damages would be too speculative.

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4. Further expanded by *Sinn v. Burd*, — Pa. —, 404 A.2d 672 (1979) holding that plaintiff's presence within the zone of danger is not a prerequisite to recovery. *See also Bliss v. The Allentown Public Library*, C.A. 80-2523 (E.D. Pa. Sept. 19, 1980) (Troutman, J.).

Said Mr. Justice Roberts: "Finally, even if we assume *arguendo* that a great deal of difficulty still remains in establishing the causal connection, this still does not represent sufficient reason to deny appellant an *opportunity* to prove his case to a jury." *Id.* at 408, 261 A.2d at 87 (emphasis theirs).

What has emerged, then, is a conflict in earlier decisional law and a present liberal trend founded upon an enlightened and humanitarian policy.

2. Pennsylvania has long been known for the adherence of its holdings to the views of the Restatement of Laws. Indeed, in at least one instance, the Pennsylvania Supreme Court imposed an even stricter standard of conduct upon defendants than does the Restatement. In *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978), the court held that the words "unreasonably dangerous" used in Restatement of Torts (Second) § 402(a) should not be included in a jury charge.

Barber's causation reasoning focused on the cause of the accident rather than on the cause of the harm, *i.e.*, in this case, death. The possible enhancement of the injuries, said the court, "has no bearing on the cause of the fall." 428 Pa. at 222, 237 A.2d at 225. And further, the court said: "Nor is appellant's contention apt that appellee's negligence was the proximate cause of his injuries because without appellee's negligence, appellant would have fallen merely three feet rather than nineteen feet. . . . [T]he extent of the injuries is irrelevant to a determination of the cause of the accident. *Id.* at 222, 237 A.2d at 225-26.[5] *Cf.* 428 Pa. at 222-23, 237 A.2d at 226-27 (Roberts, J., dissenting).

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5. *See Zlates v. Nasim*, 340 Pa. at 158, 16 A.2d at 381: "Damages cannot be awarded because the unguarded areaway was not the proximate cause of her fall."

This approach is at odds with that of the Restatement of Torts (Second) § 431 which states:

> § 431. WHAT CONSTITUTES LEGAL CAUSE
>
> The actor's negligent conduct is a legal cause of *harm* to another if
>
> (a) his conduct is a substantial factor in bringing about the *harm*, and
>
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the *harm*. (Emphasis added.)

Certainly under the Restatement formulation and my finding as to injuries (Finding of Fact No. 15C), the absence of the safety net was the cause of the harm.

3. This case is conceptually a "second accident" case. There is the original slipping or tripping followed by the unbroken fall down the elevator shaft with greatly enhanced injuries. It is like the fall from the three foot high scaffold followed by the sixteen foot fall into the open pit, again with increased injuries. It is also like the second accident automobile cases where the manufacturer is in no way responsible for the harm-initiating accident, but where a defect in design or construction caused the injuries to be more serious than they would have been absent the defect. Acceptance of the *Barber* rationale would compel Pennsylvania to deny recovery in the second accident automobile cases. The Pennsylvania Supreme Court has not yet spoken on this issue, but it seems highly unlikely that Pennsylvania would opt to deny liability in those cases. *See Hardy v. Volkswagen of America*, 65 F.R.D. 359; *Dyson v. General Motors Corp.*, 298 F.Supp. 1064; *Householder v. General Motors Corp.*, 33 Beaver County Legal J. 30 (C.P. 1973).

I am convinced that, in its present posture, the Pennsylvania Supreme Court would adopt no such reversion to the past.

4. *Barber* and its precursors also denied liability because of the asserted difficulty of apportioning damages between the original triggering accident, not due to defendant's negligence, and the increase in the seriousness of injuries which *was* brought about by defendant's negligence. I conclude that this difficulty would no longer be a viable basis for denying recovery in Pennsylvania. *See Niederman v. Brodsky,* 436 Pa. at 408, 261 A.2d at 87.

Most important, however, is that I am charged with predicting how Pennsylvania would approach this case under its own particular facts. I have found that had a safety net been in place, decedent would have suffered *no* injuries and that his death was the result of the absence of the net. Finding of Fact No. 15C. There is therefore under the facts here no room for speculation or conjecture as to the amount of damage caused by defendant's negligence.

5. For all of the foregoing reasons I predict that in this case, Pennsylvania would follow the principle that the question of proximate causation "is almost always one of fact for the jury." *Bleman v. Gold,* 431 Pa. at 354, 246 A.2d at 380.

III. Contributory Negligence

In my original adjudication I found plaintiff guilty of contributory negligence. I am now convinced I was in error because I failed to accord proper weight to the burden of proof.

Two propositions are too well settled to require citation of authority. First, a decedent is presumed to have

exercised reasonable care for his own safety; second, the burden of proving contributory negligence is on the defendant. I am not convinced that the defendant has sustained that burden.

The evidence presented by defendant on the issue of contributory negligence was so conflicting that I find myself as a factfinder left to speculation and conjecture. William Simpson testified that originally there had been five planks covering the elevator shaft. Two had been removed by DiSalvatore and his co-worker, Harry Rolf. According to Simpson, decedent was standing in the middle of the fourth plank attempting to remove the third plank when he fell. According to Rolf, however, they had started with six or seven planks and had removed all but one. It would defy the laws of nature to conclude that decedent was standing on one plank removing another, as Simpson testified, if there was only one plank remaining, as Rolf testified.

Simpson was the only eye witness to the accident and his testimony in itself was conflicting and uncertain as to the cause of the decedent's fall. He testified:

> Well, I observed that he tried to pick it up and lift it and remove it and he had—I believe that the one that he was standing on was a little warped and he had lost his balance trying to pick this other one up, and he fell forward with it.

N.T. 193-94. Again:

> Well, in other words, he had leaned over, but I guess the plank was too heavy to pick up for himself, and then when he tried to pick it up he had lost his balance, and the plank that he was standing on I guess was warped a little, and he had lost his balance

> and had feel forward with it, and then went over in between where he had picked up 1 and 2 planks.

N.T. 195-96.

On the other hand, the testimony was consistent on one critical point. Both Simpson and Rolf testified that the planking was uneven, difficult to walk on, easy to slip on or to turn one's ankle on, and if that happened, the worker would be likely to fall into the open shaft. From this testimony, the factfinder could legitimately infer that the condition of the planking caused decedent's fall.

All this evidence makes a finding as to whether the fall was caused by the warped planking, by the decedent's trying to do his job alone, or by the rough, uneven surface of the planking would be nothing but a guess.

In *Mumma v. Reading Co.*, 247 F.Supp. 252 (E.D. Pa. 1965), I said: "[T]he sufficiency of the evidence to take the issue of contributory negligence to the jury is to be tested by the same standards that are used to test the sufficiency of plaintiff's evidence on the issues of negligence and proximate cause." *Id.* at 254 (citations omitted).

In *Mudano v. Phila. Rapid Transit Co.*, 289 Pa. 51, 137 A. 104 (1927), the court, quoting from *Goater v. Klotz*, 279 Pa. 392, 396, 124 A. 83 84 (1924) said:

> Where the burden of proof is upon the plaintiff [here the defendant] to establish certain facts . . . and his testimony, or that of his witnesses, on the question, is so contradictory as to present to the jury no basis for a finding, except a mere conjecture, a nonsuit is properly entered . . . .

289 Pa. at 59, 137 A. at 107.

The *Mudano* court also emphasized the importance of the burden of proof:

> Had the testimony referred to a subject as to which the burden of proof was on the plaintiff [here, on defendant], the result might have been different, for the court is not entitled to submit evidence which would merely enable the jury to guess at a fact in favor of a party who is bound to prove it.

Id.

Since I would have to guess at the cause of decedent's fall, I cannot say that any negligence on his part was a causative factor in his death.

Finally, even if the testimony pointed unequivocally to decedent's unassisted continuance of his work as the cause of his fall, I would still hold that plaintiffs are not barred from recovery. Defendant has pleaded contributory negligence and assumption of risk, but has only argued contributory negligence. However, in this case the difference is not significant. "The great majority of the cases involving assumption of risk have been of this type, where the defense overlaps that of contributory negligence. The same kind of conduct frequently is given either name, or both. Ordinarily it makes no difference which the defense is called." Restatement of Torts (Second) § 496A, Comment d. *See also* Prosser, Law of Torts 441 (4th ed., 1971).

Here, the defendant can only and does only point to a simple act as a basis for finding contributory negligence, decedent's working alone. There is no evidence and no claim that decedent mishandled the plank or that his feet were placed wrongly or that he stood too near to the edge of the plank or that he was not looking at what he was doing. There is only the fact that he worked alone.

"The question of contributory negligence is usually one of fact for determination by the jury." *Walsh v. Miehle-Goss-Dexter, Inc.*, 378 F.2d 409, 414 (3d Cir.

1967). *Accord, Eder v. Lansberry,* 459 Pa. 621, 624-25, 331 A.2d 165, 166 (1975). "In passing on the question of negligence, courts and juries must consider the realities of the situation." *Mogren v. Gadinas,* 358 Pa. 507, 512, 58 A.2d 150, 152 (1948). The reality here was that if DiSalvatore had stood idle in his teammate's absence, his job would have been in jeopardy. The law is not so cruel as to demand a choice between economic devastation and a potential danger inherent in his job. Prosser states:

> Even where the plaintiff does not protest, the risk is not assumed where the conduct of the defendant has left him no reasonable alternative. Where the defendant puts him to a choice of evils, there is a species of duress, which destroys all idea of freedom of election.

Prosser, Law of Torts 452.

There is a clear indication of how Pennsylvania courts would react to the situation of economic duress. In *Houston v. Tri-State Machinery,* 2 D & C 3d 796 (C.P. Beaver County 1977), plaintiff was injured while using a defectively guarded saw. Plaintiff did not deny that he was aware of the danger. In sustaining a jury verdict for plaintiff, the court referred to " 'the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger. . . .' " *Id.* at 798, *quoting* Restatement 2d Torts § 402A, Comment n.

> One hired as a laborer on a construction site is simply not free to choose which equipment he will operate and which he will not. His use of dangerous machinery is dictated by the terms of his employment, and it would be absurd for this court to hold that he unreasonably and voluntarily used a product he was directed by his superiors to use. . . .

> . . . There is an obvious distinction to be drawn between the employe-employer situation and the consumer-seller situation. The routine consumer who purchases an obviously defective product can and should refuse to use it in light of the obvious danger presented. While the consumer has alternatives to using the product, the employe simply does not, and his "consent" is in reality predicated upon his maintaining his status as an employe.

Id. at 799 (emphasis in original). In view of the recent liberalization in Pennsylvania tort law, *see supra* pp. 10-12, I predict that its Supreme Court would adopt similar reasoning and would not consider decedent's conduct negligent as a matter of law.

For the same reasons, which I need embroider no more, I find as a fact that decedent was neither contributorily negligent nor voluntarily or unreasonably assumed the risk.

IV. Conclusions of Law

Conclusions of Law 1 and 2 of my previous adjudication are adopted and reaffirmed. Conclusions of law Nos. 3, 4 and 5 are stricken and the following substituted in their place as my conclusions of law.

3. Pennsylvania would hold, and I therefore conclude, that the absence of a safety net was negligence and that this negligence was the proximate cause of decedent's death.

4. Decedent is presumed to have exercised reasonable care for his own safety and the burden is on defendant to prove that decedent's negligence was the proximate cause of his death.

5. To conclude that any negligence of decedent was the proximate cause of his death would involve only speculation and a factfinder may not base a conclusion on mere conjecture.

6. Defendant has not sustained the burden of proving that any negligence of decedent was the proximate cause of his death.

7. Plaintiffs are entitled to a verdict in their favor and against defendant on liability.

/s/ JOSEPH S. LORD, III
Joseph S. Lord, III
Chief Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 76-1794

JOSEPH and MARY DiSALVATORE, Administrator and Administratrix of the Estate of MICHAEL DiSALVATORE, Deceased

v.

UNITED STATES OF AMERICA

ORDER

AND Now, this 29th day of September, 1980, the court finds in favor of the plaintiffs and against the defendant on the question of liability.

/s/ JOSEPH S. LORD, III
Joseph S. Lord, III
Chief Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 76-1794

JOSEPH and MARY DiSALVATORE, Administrator and Administratrix of the Estate of Michael DiSalvatore, Deceased

v.

UNITED STATES OF AMERICA

MEMORANDUM

LORD, *Ch. J.* December 29, 1980

Plaintiffs brought this action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, alleging that their decedent was killed as a result of defendant's negligence. In the first phase of this non-jury bifurcated proceeding, I held that plaintiffs were entitled to a verdict in their favor and against defendant on the question of liability. *DiSalvatore v. United States*, C.A. No. 76-1794 (E.D. Pa. Sept. 29, 1980). I now make the following findings of fact and conclusion of law on the issue of damages.

FINDINGS OF FACT

1. Michael DiSalvatore, plaintiffs' decedent, was born on August 11, 1954. He died on April 12, 1974 at the age of 19. At the time of his death his life expectancy was 52.4 years; and his work life expectancy was 45.6 years.

2. Michael DiSalvatore was an industrious and conscientious worker throughout his life. He began earning money when he was but six years old; and during the next thirteen years he assiduously pursued assorted jobs. At the time of his death, he had been able to accumulate more than $4,000 in savings.

3. In early 1974, decedent applied for an ironworkers apprenticeship, a three-year training program. He was not formally accepted at this time. However, Joseph Boardman, then president of Ironworkers Local 401, issued a "work permit." This allowed Michael to do menial work on ironworker construction projects.

4. Decedent began working for the American Bridge Division of the United States Steel Corporation on April 1, 1974 as a "permit man." He loved the job because it was vigorous and healthy work. He intended to stay at it and enter the ironworkers apprenticeship program.

5. Before a "permit man" is accepted into the apprenticeship program, he can work as much time as he wants on his permit. Michael DiSalvatore's lost wages from April 12, 1974—the date of death—to July 1, 1974—the date the apprenticeship would have begun—are $4,848.80. This figure is based on Table I, *infra*.

6. In 1974, there was a great demand for ironworker apprentices in the Philadelphia area. Moreover, decedent had the qualifications necessary to be admitted into the program. If he had lived, he would have applied for, and been readily accepted into, the apprenticeship program commencing July 1, 1974.

7. The apprenticeship program is a three-year program. Apprentices are paid a percentage of the journeyman's prevailing hourly wage. This percentage gradually increases during the three years. During this period, the

employer's welfare and pension contributions to an apprentice match his contributions to a journeyman. Michael DiSalvatore's lost wages from July 1, 1974—the day the apprentice program would have commenced—to June 30, 1977—the day the apprentice program would have ended—are $47,454.40. This figure is based on Table II, *infra*.

8. Michael would have persevered and successfully completed the apprenticeship program. He then would have become a journeyman ironworker. His lost wages from July 1, 1977—the day the apprenticeship program would have terminated—to December 15, 1980—the first day of trial on damages—are $98,617.60. This figure is based on Table III, *infra*.

9. Journeyman ironworkers can collect pension benefits at age sixty-five. Although some continue working til their 70's or 80's, many have retired by age sixty-five. Michael DiSalvatore would have retired at sixty-five. This is thirty-nine years after December 15, 1980. Michael DiSalvatore's lost future wages are $1,035,621.60. This figure is based on Table IV, *infra*.

10. Decedent's total lost wages are $4,848.80, $47,454.40, $98,617.60, and $1,035,621.60, a total of $1,186,542.40. *See* ¶¶ 5, 7, 8, & 9 *supra*.

11. Decedent's personal maintenance expenses--food, shelter, clothing and medical care—would have totalled $5,000 per year. When he died, his life expectancy was 52.4 years, *see* ¶ 1, *supra*; therefore his future personal maintenance expenses are 52.4 (×) $5,000—a total of $262,000.00.

12. Michael DiSalvatore's total lost net wages is the difference between $1,186,542.40 and $262,000—a remainder of $924,542.40.

13. The expenses for decedent's funeral totalled $6,986.50.

14. There is no proof as to how much, if any, contribution Michael DiSalvatore would have made to his parents during minority.

15. There was no testimony proffered that Michael DiSalvatore was still alive after his fatal fall. Therefore plaintiffs cannot recover damages for pain and suffering.

CONCLUSION OF LAW

1. Plaintiffs' decedent lost $924,542.40 in net future wages. This figure need not be reduced to present value. *Kaczkowski v. Bolubasz*, No. 116 (Pa. Sept. 22, 1980). Plaintiffs have therefore suffered damages in the sum of $924,542.40 and $6,986.50 (funeral expenses)—a total of $931,528.90.

/s/ JOSEPH S. LORD, III
Joseph S. Lord, III
Chief Judge

TABLE I

Date	(1) Wage Rate Per Hour	(2) Employer's Welfare Pension Contribution	(3) Sum of (1) & (2)	(4) Number of Hrs. Per Week [2]	(5) Product of (3) & (4)	(6) Number of Weeks	(7) Product of (5) & (6)
4/12/74 to 6/30/74	$9.32	$1.70	$11.02	40	$440.80	11	$4,848.80

1. This rate includes 60 cents per hour for "vacation stamps."

2. Ironworkers normally work 40 hour weeks. Michael DiSalvatore had worked eight hours per working day during the 11 days he worked for American Bridge. He would have continued to work 40 hours per week until the apprenticeship program started.

TABLE II

Date	(1) Apprentice Percentage of Journeyman's Hourly Wages	(2) Journeyman's Hourly Wage Rate [1]	(3) Apprentice's Hourly Wage Rate—Product of (1) & (2)	(4) Employer's Welfare & Pension Contribution	(5) Apprentice's Hourly Compensation—Sum of (3) & (4)
7/1/74-12/31/74	60	$10.22	$ 6.13	$1.70	$ 7.83
1/1/75-6/30/75	70	10.22	7.15	1.70	8.85
7/1/75-12/31/75	80	10.90	8.72	1.90	10.62
1/1/76-6/30/76	80	10.90	8.72	1.90	10.62
7/1/76-12/31/76	85	11.67	9.92	2.05	11.97
1/1/77-6/30/77	90	11.67	10.50	2.05	12.55

	(6) Number of Hours Per Week	(7) Apprentice's Weekly Comp. Product of (5) & (6)	(8) Number of Weeks in Period	(9) Number of Weeks Decedent Would Have Worked [2]	(10) Total Compensation for this Period—Product of (7) & (9)
	40	$313.20	26	19	$ 5,950.80
	40	354.00	26	19	6,726.00
	40	424.80	26	19	8,071.20
	40	424.80	26	19	8,071.20
	40	478.80	26	19	9,097.20
	40	502.00	26	19	9,538.00
					$47,454.40

1. This rate includes the employer's contribution to the vacation fund.

2. I find that a typical ironworker works approximately 38 weeks per year because of inclement weather, illness, vacations, inability to obtain work in his home locale, and labor strikes. These same factors apply to an apprentice ironworker.

TABLE III

Date	(1) Journeyman's Hourly Wage Rate [1]	(2) Employer's Welfare Pension Contribution	(3) Journeyman's Hourly Compensation—Sum of (1) & (2)	(4) Number of Hours Per Week
7/1/77-6/30/78	$12.32	$2.20	$14.52	40
7/1/78-6/30/79	13.62	2.50	16.12	40
7/1/79-6/30/80	14.17	2.60	16.77	40
7/1/80-12/15/80	14.77	2.70	17.47	40

	(5) Journeyman's Weekly Compensation—Product of (3) & (4)	(6) Number of Weeks in Period	(7) Number of Weeks in Period Would Have Worked [2]	(8) Total Compensation for This Period—Product of (5) & (7)
	$580.80	52	38	$22,070.40
	644.80	52	38	24,502.40
	670.80	52	38	25,490.40
	698.80	52	38	26,554.40
				$98,617.60

1. This rate includes the employer's one dollar per hour contribution to the vacation fund.

2. A typical ironworker works approximately 38 weeks per year. I find that 14 weeks are lost because of inclement weather, illness, vacations, inability to obtain work in his home locale and labor strikes.

TABLE IV

Date	(1) Journeyman's Hourly Wage [1]	(2) Employer's Health & Pension Fund Contribution	(3) Journeyman's Hourly Compensation—Sum of (1) & (2)	(4) Number of Hours Per Week	(5) Journeyman's Weekly Compensation—Product of (3) & (4)
12/15/80 to 12/15/2009	$14.77	$2.70	$17.47	40	$698.80

	(6) Number of Weeks Per Year	(7) Number of Weeks in Period Decedent Would Have Worked	(8) Yearly Compensation Product of (5) & (7)	(9) Number of Years in Period	(10) Future Lost Wages Product of (8) & (9)
	52	38	$26,554.40	39	$1,035,621.60

1. The journeyman's hourly wage includes the employer's $1.00 per hour contribution to the vacation fund.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 76-1794

JOSEPH & MARY DiSALVATORE, Administrator and Administratrix of the Estate of Michael DiSalvatore, Deceased

v.

UNITED STATES OF AMERICA

ORDER

AND NOW, this 29th day of December, 1980, it is hereby

ORDERED that judgment be entered for plaintiffs and against defendant in the amount of $931,528.40.

/s/ JOSEPH S. LORD, III
Joseph S. Lord, III
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1245

JOSEPH and MARY DiSALVATORE, Administrator and Administratrix of the Estate of MICHAEL DiSALVATORE, Deceased

v.

UNITED STATES OF AMERICA,
Appellant.

SUR PETITION FOR REHEARING

Present: ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges.*

The petition for rehearing filed by UNITED STATES OF AMERICA, appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ A. LEON HIGGINBOTHAM
Circuit Judge

Dated: October 16, 1981

Chief Judge Seitz did not participate in the disposition of this petition for rehearing.

Opposition

Office - Supreme Court, U.S.
FILED
FEB 16 1982
ALEXANDER L. STEVAS,

In The

Supreme Court of the United States

No. 81-1301

October Term, 1981

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOSEPH and MARY DiSALVATORE, Administrator and Administratrix of the Estate of MICHAEL DiSALVATORE, Deceased,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is the United States liable under §1346(b) of the FTCA which waives immunity when a federal government employee is negligent where the trial court made a specific finding of fact that an admitted federal employee was negligent?

II. Is there a conflict among the circuit courts on the question of whether as a landowner the United States owes a duty of care to a plaintiff, when the circuit courts are interpreting the laws of different state forums?

III. Should the United States merely because of its status, be absolved from liability where there is a finding of fact that its employee acted negligently?

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No. 81-1301

In The

Supreme Court of the United States

October Term, 1981

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOSEPH and MARY DiSALVATORE, Administrator and Administratrix of the Estate of MICHAEL DiSALVATORE, Deceased,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

On April 12, 1974, Michael DiSalvatore, a nineteen (19) year old ironworker and an employee of American Bridge Company fell six (6) floors to his death through an unprotected elevator

shaft. At the time of the accident, he was employed on the construction of the Social Security Administration Program Center, a site which was owned by the United States General Services Administration. Suit was instituted against the United States under the Federal Tort Claims Act. The government filed a motion for summary judgment claiming that it could not be held liable for the acts of its independent contractors. In a memorandum opinion dated September 15, 1979 (A3)[1] the trial court denied the motion on grounds that applying Pennsylvania law, the government retained sufficient control over the job site under §414 of the Restatement (Second) of Torts, to hold it independently liable.

After trial, the Honorable Joseph S. Lord, III, Chief Judge for the Eastern District of Pennsylvania, issued findings of fact that Albert Kandra, the government's resident engineer, and its employee on the job site, was negligent.[2] (A19-20, Findings of Fact 19 and 21). There was no evidence presented, and consequently, no findings of fact regarding any negligence on the part of the independent contractors who were working on the job site.

The construction site on which Michael DiSalvatore was killed was owned by the government which hired Turner Construction Company as overall construction managers and Owens-Corning

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1. All references are to the opinions and orders set forth in the appendix attached to the petitioner's brief. For example, A3 refers to appendix, page 3.

2. Chief Judge Lord originally held in favor of the petitioner on grounds that under Pennsylvania law there was no causation and the respondent was contributorily negligent. On post-trial motions, he reversed himself and ordered a new trial. By agreement, the entire record was resubmitted in lieu of representing the evidence. The petitioner also called one additional witness. The original findings of fact which are set forth in Chief Judge Lord's opinion of June 26, 1979 (A11) were amended in his opinion of September 29, 1980 (A25). There was no amendment of any of the findings regarding the government's contractual duties or the responsibilities of its employee on the job site.

Wolf & Munier, a Joint Venture, as prime contractors. These companies hired several subcontractors including American Bridge Company to perform the actual construction work. In his findings of fact, and consistent with the analysis of §414 of the Restatement (Second) of Torts in his opinion denying petitioner's motion for summary judgment, Chief Judge Lord set forth in detail the government's responsibility on the job site as derived from its contracts with its independent contractors (A15-18). Chief Judge Lord also found that there was a specific dispute between Turner Construction Company and Tishman Construction Company, its subcontractor, regarding the responsibility of each to comply with the OSHA regulations for protection of elevator shafts (A19-20). Kandra, the government's employee was aware of the impasse between the contractors but failed to resolve it resulting in the shaft's being uncovered (A19-21). Judgment was rendered in favor of the respondents and against the United States.

In its appeal to the Third Circuit, the petitioner argued that the United States did not retain sufficient control over the job site to give rise to a duty to the respondent under §414 of the Restatement (Second) of Torts and Pennsylvania law. The petitioner never challenged Chief Judge Lord's finding of fact that Albert Kandra was negligent, nor did it claim that any question of federal law was involved. In a judgment order issued one day after oral argument, the Third Circuit affirmed the verdict (A12). The petitioner's petition for rehearing was denied three and one half weeks later (53).

SUMMARY OF ARGUMENT

This case presents no question of federal law for review by this Court, nor is there a conflict among the circuits. In an effort to create the appearance of federal issues which do not exist, petitioner has made three arguments to this Court based on contortions of the law and facts which are contrary to the record.

The first of those arguments, that under *Logue v. United States,* 412 U.S. 521 (1973) there was not sufficient government control of the independent contractors to include them within the definition of "employee of the government", is defeated by the trial court's finding of fact that Albert Kandra, the government's resident engineer and employee on the job site, was negligent. In *Logue,* this Court explained that under the FTCA, the United States is liable whenever its employees act negligently. The question there was whether independent contractors who were not on the government payroll were "acting on behalf of" the government so as to be considered federal government employees for purposes of FTCA liability. Since the present case involves the negligence of an admitted federal employee, negligence on the part of the independent contractors is not an issue and the *Logue* analysis is not even relevant. The United States is liable here because the negligent acts resulting in DiSalvatore's death were directly attributed to an employee of the government and *not* an independent contractor.

The second argument, that there is a conflict of law among the circuits is also lacking in merit. The FTCA specifically states that when a government employee is negligent, the United States is liable to the same extent as a private person would be "in accordance with the place where the act or omission occurred." 28 U.S.C. §1346(b). Consequently the issue raised below, and that which petitioner tries to disguise here, does not involve interpretation of federal case law or federal statutes. Instead, the issue is whether under Pennsylvania law and §414 of the Restatement (Second) of Torts, the United States owed a duty of care to the respondent. It cannot be expected or hoped that the circuit courts' decisions involving varied factual circumstances would all reach the same result when they are interpreting the laws of different state forums. There is no federal issue for review by this Court.

Finally, in a desperate attempt to escape liability where it clearly exists, petitioner appeals to this Court with the plea that if something is not done to change the law, the United States will be liable in other cases where its employees are again found negligent. The government, however, enjoys no special status which entitles it to escape liability when it is negligent.

This Court should not tolerate groundless appeals based on unidentified issues where the question below was premised solely on an interpretation of state law. The petition for certiorari should be denied.

ARGUMENT

I.

Where the trial court's finding of fact was that an admitted federal employee was negligent, the decision below holding the United States liable follows the clear language of the Federal Tort Claims Act and the decisions of this Court.

The petitioner's argument, viewed in its true light, is simply that the Federal Tort Claims Act ("FTCA") which provides that the United States is liable for the negligent acts of its employees, does not mean what it says. In an effort to create an issue where none exists, petitioner attempts to persuade this Court that because there is no governmental liability for independent contractors under the doctrine of *Logue v. United States,* 412 U.S. 521 (1973), there should also be no liability when the negligent acts are committed by federal government employees.

The FTCA plainly states that the United States is liable for money damages "caused by the negligent or wrongful act or omission of any employee of the government . . ." 28 U.S.C. §1346(b). The district court made a finding of fact that Albert

Kandra, an admitted federal government employee, was negligent. *DiSalvatore v. United States,* 472 F. Supp. 816, 820 (E.D. Pa. 1979), Findings of Fact 19 and 21. Under the Act, the United States is liable for DiSalvatore's death.

Were petitioner to acknowledge that this is unquestionably the law, it would be forced to admit that there is no issue of federal law for consideration by this Court. Instead, it latches onto the fact that this job site included independent contractors as well as a federal government employee. Contrary to the findings of fact made by the trial judge, it then assumes, without so stating, that the negligent acts were committed, not by Kandra, its employee, but by the independent contractors on the job site. Petitioner's argument is, therefore, based on the underlying fact that Kandra really had nothing to do with DiSalvatore's death and that the lower courts were simply "pinning the liability" on an innocent federal employee. Therefore, it argues, since *Logue v. United States, supra,* prohibits the imposition of liability for the acts of independent contractors, the government cannot be responsible.

The government's argument is, of course, devastated by the finding of fact that Kandra was negligent. Based on the true findings of fact in this case, the *Logue* doctrine, upon which the government bases its entire argument, is not even relevant.

In *Logue,* this Court recognized that the FTCA waived immunity only in those cases where negligence was committed by a federal employee. Because the Court of Appeals had rejected the district court's conclusion that a federal employee was negligent,[3] the *Logue* Court was faced with the specific question

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3. Petitioner concedes in a footnote that *Logue* was remanded for a reconsideration of the finding that the federal employee was not negligent. If (Cont'd)

of whether the United States could be held liable for the acts of its *contractor's* negligent employees on grounds that government control was such that they were "acting on behalf of" the government and, therefore, within the definition of "employees of the government". 28 U.S.C. §2671. *Logue,* however, never questioned that if the negligence was that of a federal government employee, as is the case here, there was certainly liability.

Petitioner's argument, even if supported by the record, would have an emasculating effect on the FTCA. What the government really argues to this Court is that the mere presence of independent contractors on the job site insulates it from liability *despite the negligence of its own employees.* This proposal completely undermines the FTCA which waives immunity *only* in those cases where a government employee is negligent. Under the petitioner's theory, there would never be a case where the United States is liable and the FTCA would be meaningless.

The petitioner was not, of course, in a position to challenge the district court's finding of fact regarding Kandra's negligence in its appeal to the circuit court and, therefore, it did not do so. In order to create what it wrongly claims is a federal issue for consideration by this Court, it now silently brings the factual issue before this Court under the guise of challenging the application of the *Logue* doctrine. Since that argument was not and could not have been made by the government in its appeal to the circuit court, it has been waived and it should not be considered here. On the contrary, the petitioner's brief below

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(Cont'd)

negligent, the *Logue* Court would impose liability on the government. Petitioner attempts to distinguish the present case from the holding of *Logue* regarding government employee negligence on grounds that Kandra did not create the hazardous condition which caused DiSalvatore's death. This causation issue, which petitioner does not challenge in this Court, was decided against the government on appeal.

conceded that there was "only one theory for federal liability", specifically "whether the United States through acts or omissions of its employee, Albert Kandra, may have breached a duty of care under §414 of the Restatement (Second) of Torts."

An interpretation of state law was the only issue before the Third Circuit when it considered this case. Because the negligence at issue is that of an admitted federal employee and not of the independent contractors, there is no issue of federal law for consideration by this Court.

II.

Where the issue is whether as a landowner the United States owed a duty of care to the plaintiff, there is no conflict between the circuits in interpreting the law of different state forums.

The argument in petitioner's brief claiming that there is a conflict among the circuits is so unfounded as to constitute a prostitution of the appellate process. If the question of federal law on which the circuits disagree is of such importance to merit consideration by this Court, one would at least expect that it be clearly identified rather than merely referred to as the "Third Circuit's theory of liability." One can only surmise that this mysterious theory is either that (1) the government has sufficient control over the job site to justify a waiver of immunity when negligence is that, not of a federal government employee, but of an independent contractor on the job site or (2) the contractual powers retained by the government do not give rise to a duty to the plaintiff. If the theory at issue is the first, it has no relevance to this case since, as previously discussed, there was a specific finding of fact that Kandra, an admitted government employee, was negligent. If it is the second theory that is before this Court, it must be defeated on grounds that, as mandated by the FTCA, each circuit and *every* case which petitioner cites in its brief, was

applying the law of the particular state where the negligent act occurred. No matter how much petitioner would like it to be otherwise, it cannot be expected or hoped that the circuit court decisions involving varied factual circumstances would all reach the same result when they are interpreting the laws of different state forums.

The FTCA is no more than a waiver of immunity when negligence is committed by a federal employee. It does not change the substantive tort law of the state, nor does it create a body of federal tort law. On the contrary, the Act states specifically that when a government employee is negligent, the United States is liable to the same extent as a private person would be "in accordance with the place where the act or omission occurred." 28 U.S.C. §1346(b).

It seems incredible that although the petitioner understood that state law controlled when filing its brief with the circuit court, it has "forgotten" that fact now that it is filing a petition with this Court. On page 31 of its brief in the United States Court of Appeals for the Third Circuit, in a section entitled "The United States was not directly negligent to DiSalvatore because it owed him no duty of reasonable care" the government admitted that the issue of control involved an interpretation of state rather than federal law.

> "Throughout the proceedings below, the district court identified only one theory for federal liability. At an early stage in the case, Judge Lord found a factual dispute over whether the United States, through actions or omissions of its employee, Albert Kandra, may have breached a duty of care under §414 of the Restatement (Second) of Torts. That section provides:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Section 414 has been embraced as the law of Pennsylvania. *Byrd v. Merwin*, 456 Pa. 576, 317 A.2d 280 (1974).

In subsequent proceedings, although the court rendered findings relevant to the issue of control, it failed to discuss their significance in terms of §414. Nevertheless, a finding of direct liability on this theory is implicit in the court's conclusions of law. The United States contends that such a finding rests on a mischaracterization of the federal presence at the construction site." *Id.* at 31-2.

Immediately following the quoted portion of petitioner's brief below is Subsection 1 "The United States Owed No Duty to DiSalvatore Unless It Exercised Operational Control of the Construction Project." In the next six pages of that brief, petitioner cited thirteen[4] (13) Pennsylvania cases, and five[5] (5)

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4. *Byrd v. Merwin*, 456 Pa. 576, 317 A.2d 280 (1974); *Brletich v. United States Steel Corp.*, 445 Pa. 525, 285 A.2d 133 (1971); *Crane v. I.T.E. Circuit Breaker Co.*, 443 Pa. 442, 278 A.2d 362 (1971); *Glass v. Freeman*, 430 Pa. 21, 240 A.2d 825 (1968); *Hader v. Coplay Cement Mfg. Co.*, 410 Pa. 139, 189 A.2d 271 (1963); *Fuller v. Palazzolo*, 329 Pa. 93, 197 A.2d 225 (1938); *Pender v. Solomon*, 178 Pa. 337, 35 A. 1135 (1896); *Edmundson v. Pittsburgh, McKeesport & Youghiogheny R. Co.*, 111 Pa. 316, 2 A. 404 (1886); *Erie v.* (Cont'd)

is apparent that the classifications are founded on misrepresentations. Every case which petitioner cites was brought under the FTCA and deals with the question of whether the government had a duty to the plaintiff to act with due care. The question of duty is, in every case, a matter of the law of the state where the tort occurred. The question of duty may arise from contractual powers which the government retained in its agreement with an independent contractor, as is the case in *DiSalvatore* and *Alexander v. United States,* 605 F.2d 823 (5th Cir. 1979) (applying Texas law); *Market Insurance Co. v. United States,* 415 F.2d 459 (5th Cir. 1969) (applying Mississippi law); *United States v. Page,* 350 F.2d 29 (10th Cir. 1965), *cert. denied,* 382 U.S. 979 (1966) (applying Utah law); *Grogan v. United States,* 341 F.2d 39 (6th Cir. 1965) (applying Kentucky law); *Buchanan v. United States,* 305 F.2d 738 (8th Cir. 1962) (applying Minnesota law and considering government representative's letters, safety manuals and Army regulations in addition to the contract), in a federal statute as in *Kirk v. United States,* 270 F.2d 110 (9th Cir. 1959) applying Idaho law to 33 U.S.C. §701(b), in a state statute as in *Lipka v. United States,* 369 F.2d 288 (2nd Cir. 1966), *cert. denied,* 387 U.S. 935 (1967) (applying New York law to §§240 and 241 of the New York Labor Law), and *Cannon v. United States,* 328 F.2d 763 (7th Cir. 1964), *cert. denied,* 379 U.S. 832 (1964) (applying Illinois law to the Illinois Scaffolding Act), in a state's case law as in *Roberson v. United States,* 382 F.2d 714 (9th Cir. 1967) (applying Arizona's "Good Samaritan" doctrine) and *Jeffries v. United States,* 477 F.2d 52 (9th Cir. 1963) (applying Montana's "Good Samaritan" doctrine), in a voluntary safety inspection program as in *Lemley v. United States,* 317 F. Supp. 350 (N.D. W. Va. 1970), *aff'd per curiam,* 455 F.2d 522 (4th Cir. 1971) (applying West Virginia law) or in a general duty to inspect as in *United States Fidelity and Guaranty Co. v. United States,* 446 F.2d 851 (10th Cir. 1971) (applying New Mexico law); *Perez v. United States,* 594 F.2d 280 (1st Cir. 1979) (applying Puerto Rico law) and *Gowdy v. United States,* 412 F.2d 525 (6th

district and circuit court opinion which apply Pennsylvania law in an unsuccessful effort to convince the circuit court that the district court's decision in favor of the respondent constituted a misapplication of the law of Pennsylvania. It is significant that the petitioner has not chosen to cite even one of the cases it cited below in its application to this Court.

Instead, and again without even identifying the issue in question, petitioner relies primarily on six cases from the Fifth, Ninth and Tenth Circuits which it claims conflict with the "principle of liability adopted by the court below", two cases emanating from the Sixth Circuit, where "the same conflicting principle appears to have been adopted, but in cases where alternative grounds also support the result", one First Circuit case which it states "adopted the conflicting principle of the Fifth, Ninth and Tenth Circuits, but in a factual context that is not entirely similar to the present case", and four cases from the remaining circuits which have "applied the same rule as the Fifth, Ninth and Tenth Circuits, but as an interpretation of state law, rather than the Federal Tort Claims Act."

The petitioner's categorization of these cases and its admission that some of the cases are governed by state law lends a false credibility to its argument that the undefined issue may be a question of federal law. When one reads the cases, however, it

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(Cont'd)

Caulkins, 85 Pa. 247 (1877); *Allen v. Willard*, 57 Pa. 374 (1868); *Painter v. Pittsburgh*, 46 Pa. 213 (1863); *Hargrove v.Frommeyer & Co.*, 229 Pa. Super. 298, 323 A.2d 300 (1974); *Calendar v. Allegheny County Sanitary Authority*, 208 Pa. Super. 390, 222 A.2d 461 (1966).

5. *McCormack v. Noble Drilling Corp.*, 608 F.2d 169 (5th Cir. 1979); *Anderson v. Iceland S.S. Co.*, 585 F.2d 1142 (1st Cir. 1978); *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3rd Cir. 1977), *cert. denied*, 434 U.S. 861 (1978); *Fisher v. United States*, 441 F.2d 1288 (3rd Cir. 1971); *Toole v. United States*, 443 F. Supp. 1204 (E.D. Pa. 1977).

Cir. 1969), *cert. denied,* 396 U.S. 960 (1969) (applying Michigan law). No matter what the context, the question of duty remains an issue of state law interpretation.

It is not surprising that contrary to *DiSalvatore,* none of the cases which petitioner cites give rise to a duty by the government to the plaintiff. The simple explanation is that petitioner fails to cite to this Court a single case interpreting §414 of the Restatement (Second) of Torts under the law of Pennsylvania. *Moss v. Swann Oil, Inc.,* 423 F. Supp. 1280 (E.D. Pa. 1977);[6] *Byrd v. Merwin,* 456 Pa. 516, 317 A.2d 280 (1974); *Hargrove v. Frommeyer & Company,* 229 Pa. Super. 298, 323 A.2d 300 (1974) were all cases in which the court made a determination of control based on the combined effect of a list of powers retained by the owner. These cases were cited in respondent's brief below and applying Pennsylvania law, the Third Circuit apparently found them persuasive.

This Court should not tolerate groundless appeals, based on unidentified issues where the question below was premised solely on an interpretation of state law. The petition for certiorari has no merit and should be denied.

III.

The United States is in the same position as any other landowner and if it acts negligently it must be held accountable.

In a desperate attempt to escape liability where it clearly exists, the petitioner appeals to this Court with the plea that if something

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6. In *Moss* the court held that the defendant was not liable because there was no evidence to support that it failed to act with reasonable care. The court did hold, however, that the defendant retained sufficient control as required by §414.

is not done to change the law, the United States will be liable in other cases where its employees are again found to be negligent. Petitioner supports its argument with the absurd notion that it should be able to perpetuate its negligent behavior with impunity merely because it has always done so. This idea is so incredible that it is surprising that petitioner has actually made the argument to this Court.

The obvious premise of this argument is that because petitioner is the United States Government, it enjoys a special status which entitles it to override the law. That, of course, is not so. There is no special privilege which allows it to act irresponsibly where others cannot. The government is in the same position as any other landowner and if it acts negligently, it must be held accountable.

Despite petitioner's argument to the contrary, it will not be difficult for the government to comply with the law without charging the taxpayer. There would have been no liability in this case if the government's resident engineer had done his job properly. Since he did not, the verdict will be paid by the Great American Insurance Co., insurer for the General Services Administration and not the taxpayer as improperly argued by the petitioner.

The fact that a negligent party does not like the law which holds it liable is not sufficient reason for this Court to consider its case. The petition for certiorari should be denied.

CONCLUSION

The circuit court's decision was based solely on a question of state law. There is no federal question which merits consideration by this Court. The petition for certiorari should be denied.

Respectfully submitted,

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Petitioner's Reply Brief

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No. 81-1301

IN THE

Supreme Court of the United States

October Term, 1981

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSEPH and MARY DiSALVATORE, Administrator and Administratrix of the Estate of MICHAEL DiSALVATORE, Deceased,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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EXPLANATORY NOTE

This Reply Brief is being filed in the name of the United States of America by counsel for Great American Insurance Company, which, as insurer of the General Services Administration, defended this litigation on behalf of the United States at the request of the United States Department of Justice. It is not being filed on behalf of the Solicitor General.

Great American Insurance Company is a wholly owned subsidiary of American Financial Corporation, the stock of which is wholly owned by a private individual.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner files this reply brief pursuant to Rule 22.5 in response to arguments raised in respondents' brief in opposition to the Petition.

Respondents' brief relies on three assertions which merit reply: (1) that the federal law issue was not raised in the court below; (2) that the district court's finding that a government employee was "negligent" disposes of the federal law issue; and (3) that the United States is in the same legal position as any private landowner. Each of these contentions is incorrect.

1. The Issue Raised by This Petition Was Fully Argued in the Court Below.

Rather than burden the Court with extensive text from the briefs below, the following excerpt from petitioner's principal brief should dispose of the respondents' contention that the issue raised by this Petition was not raised there:

> "A. The United States May Not be Held Liable for the Negligence of Independent Contractors.
>
> "The Federal Tort Claims Act subjects the United States to liability for personal injury or death 'caused by the negligent or wrongful act or omission of . . . the Government.' 28 § 1346(b). The Act also places limitations on the government's waiver of sovereign immunity. The United States may not be charged with tort liability arising from performance of discretionary functions, *Dalehite v. United States*, 346 U. S. 15 (1953), and it may not be held vicariously liable for the acts of third parties such as independent contractors. 28 U. S. C. § 2671; *see Logue*

v. United States, 412 U. S. 521, 526-27 (1973). The Act also proscribes any kind of strict liability. Only negligence by government employees is compensable in an action sounding in tort. *Laird v. Nelms*, 406 U. S. 797 (1972).

> "As the district court recognized, these limitations narrow the range of legal theories available to the plaintiffs. 456 F. Supp. at 1081. In particular, breaches of duty by Turner, the Joint Venture, or American Bridge, if any, are irrelevant to this lawsuit. Only if the government breached its own direct obligation of due care to the plaintiffs' decedent, and only if that breach was a proximate cause of DiSalvatore's fall, can the judgment of the district court stand."

Petitioner raised the issue a second time in its petition for rehearing, in a 7-page section headed "The Panel's Decision Conflicts With Supreme Court . . . Precedent Defining The Scope of Liability Under the Federal Tort Claims Act." That section contained the following language summarizing the argument:

> "Only if there were *direct* negligence by government employees, and only if that negligence were the cause of the accident, could the United States be required to compensate for damages. By assessing liability in circumstances where no such direct negligence exists, the district court and panel decisions neglect the fundamental distinction drawn by Congress and unduly expand the perimeters of the FTCA [Federal Tort Claims Act]." (p. 3)
>
> "By misconstruing the limits of § 414, the district court and panel decision have converted the concept of 'control' into an alternative form of vicarious liabil-

ity and thereby have overstepped the bounds of the Federal Tort Claims Act." (p. 7)

This is the same issue Petitioner is raising here. It was obviously fully raised in the court below.

2. The District Court's Finding of "Negligence" Is Not Dispositive Because It Is Based on the Wrong Standard of Federal Law.

Contrary to respondents' contention, the district court's finding that the government's resident engineer was "negligent" does not dispose of the issue raised by this Petition. Instead, it avoids the issue entirely.

As pointed out in the Petition, the so-called "negligence" found by the district court merely consisted in the government engineer's failure to exercise contractual inspection rights and to insist on total adherence by the independent contractor to safety specifications in the contract. Imposing a duty to do so is the same thing as assessing vicarious liability, which Congress and this Court have rejected as a basis for FTCA recovery. *Logue v. United States*, 412 U. S. 521 (1973); *United States v. Orleans*, 425 U. S. 807 (1976); *Laird v. Nelms*, 406 U. S. 797 (1972). This is an important question of law, not fact, and it is a question of federal, not state, law.

3. As a Sovereign Entity, the United States Is Not in the Same Position as Other Alleged Tortfeasors.

The United States is obviously not, as respondents contend, in the same position as any other alleged tortfeasor.* Absent an express waiver, it is immune from

* For some reason, respondents limit this assertion to "landowners," as if that fact had some significance to this Petition. It does not. Neither of the courts below based the government's liability on its status as a landowner.

suit. The issue presented by the Petition is whether, in cases like this one, the government has waived that immunity. This is an important federal issue, and we believe the Court should grant certiorari to decide it.

Respectfully submitted,

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